

Seattle University School of Law Digital Commons

Faculty Scholarship

1-1-2006

The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence

Andrew Siegel

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>



Part of the [Courts Commons](#), and the [Litigation Commons](#)

Recommended Citation

Andrew Siegel, The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence, 84 *TEX. L. REV.* 1097 (2006).

<https://digitalcommons.law.seattleu.edu/faculty/477>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.

Texas Law Review

Volume 84, Number 5, April 2006

Articles

The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence

Andrew M. Siegel*

Previous commentators on the Rehnquist Court's history, seeking an overarching explanation for the Court's cases, have focused their attention primarily on a revitalized "federalism," an agenda-driven "conservatism," and a constitutionally fixated "judicial supremacy." While each of these themes is undoubtedly present in the Court's later jurisprudence, this Article argues that one cannot understand the Rehnquist Court's complicated intellectual matrix without taking account of its profound hostility toward the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice.

The Article takes a pointillist approach, commenting on a large swath of the Court's caseload and allowing a broader picture to gradually emerge from observations about seemingly discrete areas of law. It first unpacks the contours of the Rehnquist Court's hostility toward litigation, focusing attention on a number of areas where the Court has acted aggressively and explicitly to limit

* Assistant Professor of Law, University of South Carolina. J.D., New York University; M.A., History, Princeton University; B.A., Yale University. As a law clerk for Justice John Paul Stevens during the Supreme Court's 2000–2001 term, I participated in a number of the cases discussed in this Article. Though it should go without saying, it is worth reiterating—given the contentiousness of some of the issues discussed herein—that the ideas and opinions expressed in this Article are (as much as any ideas ever can be) mine alone and that I neither consulted with Justice Stevens in the preparation of this Article nor relied on any privileged communications. I would like to thank Deborah Ahrens, Rick Bierschbach, Josie Brown, Greg Flowers, Amanda Frost, Emily Deck Harrill, Troy McKenzie, Trevor Morrison, Eduardo Peñalver, Joel Samuels, Richard Seamon, and Daniell Spinelli for their input at various points in this project. I presented early versions of this project at the 2003 SEALS Annual Conference and the 2005 University of South Carolina Faculty Colloquium and thank the participants in those events for their comments.

the scope or availability of litigation, including remedies and rights of action, qualified immunity and attorney's fees, the enforceability of mandatory arbitration agreements, and limitations on the permissible scope of punitive damage awards. The Article then moves from the explicit to the implicit, examining well-rehearsed areas of the Court's jurisprudence (such as its federalism cases and the 2000 Presidential election controversy) in an effort to identify the subtler effects of the Court's reflexive hostility to litigation on its constitutional docket. Finally, the Article pulls back from the cases to interrogate the sources of the Court's hostility to litigation, exploring not only the reasons for that hostility but also its curious coexistence with the Court's concurrent commitment to an aggressive form of judicial supremacy, particularly in the constitutional arena.

I.	Introduction.....	1099
II.	Defining the Project.....	1110
A.	Periodizing the Rehnquist Court.....	1110
B.	Defining "Hostility" and "Litigation"	1114
C.	The Limits and Scope of My Thesis.....	1115
III.	The Contours of the Court's Hostility to Litigation.....	1117
A.	A Reluctance to Afford Remedies: The Paradigm Cases	1118
1.	<i>The Cases</i>	1119
2.	<i>Their Similarities</i>	1121
3.	<i>Some Lessons</i>	1124
B.	Official Immunity and Fee-Shifting Statutes: Judicially Crafted Obstacles to Democratically Adopted Remedies.....	1129
1.	<i>Qualified Immunity and Related Doctrines</i>	1130
2.	<i>Attorney's Fees in Civil Rights Actions</i>	1136
C.	Embracing Arbitration: Deprivileging the Courts	1139
1.	<i>The Rehnquist Court and the Federal Arbitration Act</i>	1139
2.	<i>An Intriguing Episode of Indecision</i>	1143
D.	Punitive Damages and the Due Process Clause: Constitutionalizing Tort Reform	1146
1.	<i>Punitive Damages and Anti-Litigation Zeal</i>	1146
2.	<i>Some Lessons from the Punitive Damages Cases</i>	1149
IV.	Hostility to Litigation and the Rehnquist Court's Federalism Jurisprudence.....	1152
A.	Sovereign Immunity	1153
1.	<i>The Court's Decisions</i>	1153
2.	<i>Unpacking the Dignity Rationale</i>	1157
3.	<i>Substantive Points of Contact with Litigation Hostility</i>	1162
B.	Paths Not Taken	1165
1.	<i>Preemption</i>	1165
2.	<i>The Independent Authority of the Courts to Set Their Own Procedures</i>	1170

V.	Reading <i>Bush v. Gore</i> Through the Prism of Litigation Hostility.....	1176
A.	Narrating the Controversy	1177
B.	Explaining the Reaction of the Court	1181
C.	The Explanatory Power of the Court's Hostility to Litigation.....	1182
1.	<i>The First Cryptic Per Curiam</i>	1183
2.	<i>The Curious Persistence of the Article II Issue</i>	1187
3.	<i>The Chasm Between the Majority and Justices Breyer and Souter</i>	1191
4.	<i>Justice Stevens's Famous Dissent</i>	1193
VI.	Notes for a Rehnquist Court Historian.....	1196
A.	Defining the Phenomenon to Be Explained.....	1197
B.	Some Possible Explanatory Vectors	1199
VII.	Conclusion.....	1202

I. Introduction

With the passing of Chief Justice William Rehnquist, the task of analyzing and assessing the historical importance of his tenure has acquired a new urgency and bracing sense of finality. Those who turn to that task in the months and years ahead, will, however, be joining a conversation well under way. Over the last half decade, a diverse set of academics, journalists, judges, and practicing attorneys have flooded the market with books, law review articles, and popular commentary taking stock of an era drawing to a close.¹ While these works differ in tone, rigor, and intended audience, they

1. It is a measure of the breadth of this trend that any list of the relevant works would almost certainly be incomplete and would, in any event, be out of date before it hit the presses. Some of the most insightful, interesting, and controversial of these works include: MARTIN GARBUS, *COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW* (2002); JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002); *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* (Herman Schwartz ed., 2002); *THE REHNQUIST COURT: A RETROSPECTIVE* (Martin H. Belsky ed., 2002); *REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* (Earl M. Maltz ed., 2003); *THE REHNQUIST LEGACY* (Curtis Bradley ed.) (forthcoming); KENNETH W. STARR, *FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE* (2002); MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2005); Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481 (2002); Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill*, 47 ST. LOUIS U. L.J. 659 (2003); Eric R. Claeys, *The Limits of Empirical Political Science and the Possibilities of Living-Constitution Theory for a Retrospective on the Rehnquist Court*, 47 ST. LOUIS U. L.J. 737 (2003); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301 (2002); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Lino A. Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term*, 26 HARV. J.L. & PUB. POL'Y 281 (2003); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We The Court*, 115 HARV. L. REV. 4 (2001); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence*

have shared a common aspiration: to write the first draft of the Rehnquist Court's history.²

At least until recently, these Rehnquist Court proto-historians³ have operated under an all but uniform assumption that Chief Justice Rehnquist and his allies on the Court instigated a judicial "revolution" that has fundamentally altered both the substance of American law and the institutional arrangements through which we develop and enforce legal norms.⁴ Operating under this assumption, commentators have searched for a grand narrative to connect and explain the Rehnquist Court's jurisprudence.

The favorite narrative of the earliest commentators (and the one that still dominates popular commentary) tells the story of a Court obsessed with issues of federalism and, more specifically, dedicated to recalibrating the balance between federal and state powers so as to limit federal authority and empower the states.⁵ A more recent counter-narrative suggests that the

of *Social Discovery*, 90 CAL. L. REV. 485 (2002); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003); William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167 (2002); Jed Rubenfeld, Essay, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002); Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307 (2001); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002); Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is,"* 59 WASH. & LEE L. REV. 839 (2002).

2. As Thomas Merrill, among others, has demonstrated, it is an oversimplification bordering on an inaccuracy to refer to "the Rehnquist Court" in the singular. The Court's concerns, doctrines, and practices can be broken fairly cleanly into two eras, the first stretching from September 1986 until June 1994 and the second tracing from the ascension of Justice Stephen Breyer in September 1994 to the death of Chief Justice Rehnquist during the summer of 2005. Merrill, *supra* note 1, at 569–70. Moreover, some have suggested that the last two to four terms may amount to yet a third distinctive era or perhaps even a prelude to the end of the Rehnquist Court. See, e.g., Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 5, 2004, at A1. For my take on the problem of periodizing the Rehnquist Court, see *infra* subpart II(A).

3. I refer to the scholars who have attempted to make sense of the Rehnquist Court as "proto-historians" here and in several other places. By that term, I mean to credit them with starting the ball rolling on the crafting of a comprehensive legal history of the Rehnquist Court while acknowledging that many of them do not see themselves as historians or their scholarship as works of history.

4. References to a "Rehnquist Revolution" and statements that we are in the midst of (or just completed) a jurisprudential "revolution" are routine in both popular and scholarly commentary on the Rehnquist Court. See, e.g., Charles J. Ogletree, Jr., *The Rehnquist Revolution in Criminal Procedure*, in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT, *supra* note 1, at 55; Kramer, *supra* note 1, at 130 ("We are witnessing the beginnings of a constitutional revolution . . ."); Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court Is Dead at 80*, N.Y. TIMES, Sept. 5, 2005, at A1 ("William H. Rehnquist, who died Saturday at the age of 80 almost a year after learning he had thyroid cancer, helped lead a conservative revolution on the Supreme Court during 19 years as chief justice of the United States."); Tony Mauro, *The Rehnquist Revolution's Humble Start*, LEGAL TIMES, Feb. 3, 2003, at 1; Edward Lazarus, *Looking Back at the Past Supreme Court Term: The Rehnquist Revolution Comes to a Standstill, For Now*, FINDLAW, July 8, 2004, <http://writ.news.findlaw.com/lazarus/20040708.html>.

5. References to the Rehnquist Court or its jurisprudence as embracing "federalism" are so voluminous as to defy compilation. For one comprehensive defense of the Rehnquist Court's "federalism" (coupled, as is often the case, with a lament that the Court has not gone further), see Massey, *supra* note 1. For fairly recent statements holding to the view that federalism is at the heart

purported dedication of the Court to federalist principles reflects little more than a convenient strategy for achieving particular substantive political ends—ends that, in line with modern usage and for want of a better term, are often described as “conservative.”⁶ Yet a third narrative—elegantly argued by a number of scholars enraged but unsurprised by the Court’s decision in *Bush v. Gore*⁷—focuses our attention not so much on the results of the Rehnquist Court’s decisions but on the presumptuous claims of judicial competence, authority, and supremacy that undergird these decisions.⁸

The purpose of this Article is not to tear down any of these narratives. Indeed, it is hard to imagine any coherent historical account of the Rehnquist Court that does not come to terms with the Court’s commitment to

of the Rehnquist Court’s story, see, for example, Saikrishna Prakash, *Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism?*, 73 U. COLO. L. REV. 1363, 1363 (2002) (“[T]he Court has shown an old-fashioned interest in the rights of states and the limits on federal power.”); Erwin Chemerinsky, *The Court Marks the Limits of Federalism*, TRIAL, Sept. 2003, at 76, 76 (“When historians look back at the Rehnquist Court, undoubtedly they will say that its most significant changes to the law have been with regard to federalism.”).

6. See, e.g., Chemerinsky, *supra* note 1, at 659 (“[T]he reality is that the recent and current activism—as measured by invalidated laws and overruling precedent—is all in a conservative direction.”); Fallon, *supra* note 1, at 434 (“When federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates.”); Merrill, *supra* note 1, at 574 (noting that one of the traits of the “second” Rehnquist Court is that of “an aggressively conservative jurisprudence in the area of constitutional federalism”); Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 121–23 (1998) (arguing that conservatives’ support for federalism doctrines is entirely instrumental and linked to promotion of substantively conservative outcomes); Richard Briffault, *A Fickle Federalism*, AM. PROSPECT, Mar. 1, 2003, at A26, A26 (noting a “five-justice conservative majority” which favors greater state power only when it serves conservative ends); cf. Rubinfeld, *supra* note 1 (speculating that an “anti-antidiscrimination agenda” is actually motivating the Court in its decisions restricting federal power). For an excellent general discussion of the relationship between the (early) Rehnquist Court’s jurisprudence and one of the texts of conservative political thought, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994) (exploring the philosophical theories of Edmund Burke and their relation to the actions of the Court).

7. 531 U.S. 98 (2000).

8. See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (arguing that the Court’s disregard for any past constraints placed upon it by the political question doctrine has resulted in the Court’s belief that it is the final answer to (almost all) constitutional questions and that the other political branches’ interpretations are to be accepted solely at its discretion); Bilionis, *supra* note 1, at 495 (“Rather than respond with typical judicial congeniality and equanimity, the Court confronts [some] precedent as a dangerous constitutional intruder and challenges the very legitimacy of its underlying . . . premises as antithetical to constitutional first principles.”); Colker & Brudney, *supra* note 1 (arguing that the Rehnquist Court demonstrated an unprecedented lack of deference to congressional legislation); Kramer, *supra* note 1, at 130 (“The Rehnquist Court’s activism explicitly denies the people any role in determining the ongoing meaning of their Constitution, other than by the grace of the Justices themselves . . .”); Avaim Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 702 (2002) (“A brief survey of decisions in the months immediately after *Bush v. Gore* . . . illustrates the glib unconcern among the Justices for the usual roles of other branches, for the states, or even for everyday lawyering. Instead, we begin to see a sustained effort to break down the public nature of government at all levels.”); cf. *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) (“Power, not reason, is the new currency of this Court’s decisionmaking.”).

strengthening “our federalism,”⁹ the conservative social and political ends served by many of its decisions, or the aggressive manner in which the Court has staked out its role as the primary and ultimate arbiter of the Constitution’s meaning.

Nevertheless, these narratives—whether taken individually or read synchronically—are incomplete and, as a result, often misleading. Take the federalism thesis first. Certainly, principles of federalism dominate the Court’s rhetoric.¹⁰ However, as others have observed, the picture is much more complicated on the plane of results.¹¹ While the states and their allies have won a number of major victories at the Supreme Court over the last decade, their record of success has been far from uniform even in the areas where the Court has expressed the greatest sympathy for their position.¹²

9. *Alden v. Maine*, 527 U.S. 706, 748 (1999) (“[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”).

10. Almost all of the inmemorable phrases and passages from the Rehnquist years involve issues of state sovereignty. See, e.g., *id.*; *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (“This is a case about federalism. It concerns the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus.”). The following quote is another excellent example of a memorable passage:

Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 839 (1995) (Kennedy, J., concurring).

11. See, e.g., Colker & Scott, *supra* note 1, at 1303–06 (analyzing the role of ideology in the Court’s decisions involving state action); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1323 (1999) (considering political ideology as an influence on the results of several federalism cases); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 2–6 (2003) (discussing areas of law which remain unchanged by the “new federalism”); Rubinfeld, *supra* note 1, at 1141–44 (positing “anti-antidiscrimination” as a motivating ideology behind the Court’s recent federalism cases).

12. See, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (holding that the federal government has authority under the Commerce Clause to regulate intrastate possession of marijuana even if the drug is held for medicinal use under a procedure authorized by state law); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam) (summarily reversing a decision of the Alabama Supreme Court that had relied on an inappropriately circumscribed reading of Congress’s powers under the Commerce Clause); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that, the Eleventh Amendment notwithstanding, states are liable for damages for violating the Family and Medical Leave Act because Congress validly abrogated the states’ sovereign immunity pursuant to Section 5 of the Fourteenth Amendment); *Pierce County, Wash. v. Guillen*, 537 U.S. 129 (2003) (unanimously reversing a decision of the Washington Supreme Court that had relied on an inappropriately circumscribed reading of Congress’s Commerce Clause power); *Reno v. Condon*, 528 U.S. 141 (2000) (unanimously rejecting South Carolina’s Tenth Amendment challenge to the Driver’s Privacy Protection Act).

During the October 2003 Term of the Court, advocates for tighter restrictions on federal power and greater state autonomy went zero for five before the Supreme Court. See *Hibbs v. Winn*, 542 U.S. 88 (2004) (holding that the federal Tax Injunction Act does not bar federal courts from considering federal constitutional challenges to state tax credits); *Sabri v. United States*, 541 U.S.

More importantly, the federalism bug has thus far skipped over entire areas of jurisprudence, some of which—such as preemption—would appear on first blush to be fertile grounds for the development of new state-favoring, federalism-oriented doctrines.¹³ Finally, the “respect” for the states that the Court speaks so eloquently about in the Eleventh Amendment and Commerce Clause contexts is often strikingly absent in both word and deed when the Court reviews the actions of state legislatures and judges in cases that are not so self-evidently “about” federalism.¹⁴

Recognizing federalism’s limits as a predictor of the Rehnquist Court’s behavior, a number of commentators have argued that the intellectual engine of the Court’s jurisprudence has been a substantive, policy-oriented agenda variously described as “conservative,”¹⁵ “antiregulatory,”¹⁶ or “anti-antidiscrimination.”¹⁷ While appropriately focusing attention on the concrete results of the Court’s decisions and successfully demonstrating the futility of predictive models that do not take into account the political valence of the legislation under consideration, these scholars’ contributions are subject to

600 (2004) (upholding the constitutionality of a statute that makes it a federal crime to bribe officials of a state or local government that receives at least \$10,000 in federal funds, regardless of whether federal monies are involved); *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that the Eleventh Amendment is not a bar to individuals suing states under Title II of the Americans with Disabilities Act when state court facilities are not accessible to the handicapped); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) (holding that because a bankruptcy action is an in rem action, it does not implicate the Eleventh Amendment and does not require dismissal of suit by a bankrupt individual against a state agency seeking to discharge student loan debt under federal law); *Frew v. Hawkins*, 540 U.S. 431 (2004) (holding that the Eleventh Amendment does not prohibit federal courts from enforcing consent decrees even when the decrees may require steps that might not be required by constitutional or statutory provisions).

13. The reluctance of the Court to couple its forays into federalism with decisions narrowly construing congressional intent to preempt state laws has been the subject of significant scholarly commentary. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEXAS L. REV. 1321, 1428–30 (2001); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087 (2000); Massey, *supra* note 1, at 438, 502–12; Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 229 & n.16 (2000); James B. Staab, *Conservative Activism on the Rehnquist Court: Federal Preemption is No Longer a Liberal Issue*, 9 ROGER WILLIAMS U. L. REV. 129 (2003); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEXAS L. REV. 1, 4, 30–32 (2004). The Court’s similar reluctance to craft doctrines protecting state courts from federally imposed rules and procedures has drawn considerably less attention. For a significant exception, see Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001). For my take on both of these (non)developments, see *infra* subpart IV(B).

14. See generally Colker & Scott, *supra* note 1 (discussing, quantifying, and analyzing current Justices’ willingness to “diss” states by overriding and often demeaning the work product of state legislators, regulators, and judges).

15. E.g., *id.* at 1311 (noting that “one lasting legacy of the Rehnquist era may be to redefine federalism so as to include activism on behalf of a conservative political agenda”); Fallon, *supra* note 1, at 446 (“It is widely agreed that the current Supreme Court includes at least five conservative justices and that commitments to federalism and sovereign immunity are part of a conservative judicial philosophy.”).

16. E.g., Cross, *supra*, note 11, at 1323.

17. Rubenfeld, *supra* note 1.

two cross-cutting criticisms. First, with a few notable exceptions,¹⁸ the substantive principles these scholars identify have been remarkably under-theorized. To take a label that has as little inherent content as “conservative” and apply it to a Court that has aggressively courted that very appellation smacks of a truism: as our very notions of what it means for a Court to be conservative have been shaped by watching the Rehnquist Court in action, it is neither surprising nor particularly useful to describe the current Court as such.¹⁹ Paradoxically, a recent series of important and surprising decisions distressing to the political right have raised serious questions as to whether the current Court can be described as “conservative”—no matter how capacious the term—without serious clarification, modification, or explanation.²⁰

In the aftermath of *Bush v. Gore*,²¹ a third strain of scholars have made an important contribution to the Rehnquist Court’s proto-history by exploring what might be called the Court’s “judicial temperament.”²² These scholars have noted that in any number of subject areas, the Court’s opinions have been characterized by an aggressiveness of both tone and substance that, depending on one’s perspective, might be characterized as either presumptuousness or bravery.²³ In particular, commentators have focused on

18. See *id.* at 1141–42 (criticizing labels like “textualism,” “activism,” and “federalism” as “manifestly insufficient” when describing the Rehnquist Court and instead describing the theme of the Court’s jurisprudence as “anti-antidiscrimination”); McGinnis, *supra* note 1, at 1 (seeking to “ground the full range of [the Rehnquist Court’s] jurisprudence in a coherent theory of governance” by comparing its jurisprudence to Tocqueville’s theory of democracy).

19. For one largely successful effort to explore what it means for a Court to be conservative, see Yonng, *supra* note 1.

20. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (declaring that citizens detained as enemy combatants are still entitled to due process protections); *Rasul v. Bush*, 542 U.S. 466 (2004) (allowing aliens held by the U.S. military at Guantanamo Bay, Cuba to challenge their detention using the writ of habeas corpus); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling prior precedent and holding that the Constitution prohibits states from criminalizing same-sex sexual activity between adults); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (endorsing and validating continued use of affirmative action under certain circumstances); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (same); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that, the Eleventh Amendment notwithstanding, states are liable for money damages for violating the Family and Medical Leave Act because Congress validly abrogated states’ sovereign immunity pursuant to Section 5 of the Fourteenth Amendment). See also Graglia, *supra* note 1 (arguing that the Rehnquist Court is not a conservative court); Marci Hamilton, *The Supreme Court’s End of Term Cases*, FINDLAW, July 3, 2003, <http://writ.news.findlaw.com/hamilton/20030703.html> (arguing that recent decisions demonstrate a more centrist political affiliation for the Court than commentators suggest).

21. 531 U.S. 98 (2000).

22. For one particularly elegant version of this argument, see Larry D. Kramer, *supra* note 1. For Dean Kramer’s take on *Bush v. Gore*, see Larry D. Kramer, *The Supreme Court in Politics*, in THE UNFINISHED ELECTION OF 2000 (Jack N. Rakove ed., 2001). Kramer is hardly alone in accusing the Rehnquist Court of turning to a new form of activism after the mid-1990s. See, e.g., Barkow, *supra* note 8; Bilionis, *supra* note 1; Colker & Brudney, *supra* note 1; Law, *supra* note 1; Soifer, *supra* note 8.

23. See, e.g., Kramer, *supra* note 1, at 15 (noting that the Court “sees no need to accommodate the political branches at all” and “has instead staked its claim to being the *only* institution

the Court's growing unwillingness to defer to other bodies—whether the body in question is Congress, an executive agency, a state legislature, or another court.²⁴ In one of the most influential and insightful analyses of this phenomenon, Dean Larry Kramer persuasively argues that the substance and tone of the Court's recent constitutional decisions reflect a hyper-aggressive commitment to "judicial supremacy" ("the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone")²⁵ that is rapidly shading over into an unprecedented embrace of "judicial sovereignty" (the belief that the Court can and must "wield its authority over every question"²⁶ and that, when it does, the Court can and should "dismiss" or "quickly supplant the views of other, more democratic institutions").²⁷

Though some commentators have disputed whether the Rehnquist Court's juridical assertiveness is unique,²⁸ the brusqueness with which the

empowered to speak with authority when it comes to the meaning of the Constitution"); Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 288 (2001) (arguing that the "Court's self-confidence in matters constitutional is matched only by its disdain for the meaningful participation of other actors in constitutional debate"). Over the last five years, this theme has worked its way into journalistic commentary about the Court, in particular into the work of the *New York Times*' influential Supreme Court correspondent, Linda Greenhouse. See, e.g., Greenhouse, *supra* note 4, at A1 (describing "the Court's institutional enhancement" as a central legacy of Chief Justice Rehnquist's tenure); Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1 ("It is a Court that in recent years has displayed a notable institutional self-confidence, striking down federal statutes at near-record rates.").

24. See, e.g., Bilinois, *supra* note 1, at 486–87 (noting that the Court's decisions limiting Congressional authority under the Commerce Clause and Section 5 of the Fourteenth Amendment "mark a judicial willingness to police the boundaries of the federal government's enumerated powers that has not been seen in generations"); Colker & Brudney, *supra* note 1, at 83 ("In acting repeatedly to invalidate federal legislation, the Court is using its authority to diminish the proper role of Congress.").

25. Kramer, *supra* note 1, at 6.

26. *Id.* at 13.

27. *Id.* Kramer not only points out the importance of judicial supremacy in understanding the Rehnquist Court, but also argues that the Rehnquist Court's commitment to that concept is both historically distinctive and normatively disastrous. *Id.* at 14–15. See also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (developing these themes more fully, tracing the historical background in more detail, and arguing for a return to a more organic and chaotic "popular constitutionalism"). Reviewers by and large have not been friendly to Dean Kramer's book or to his historical analysis in particular. See, e.g., Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (book review); Richard A. Posner, *The People's Court*, NEW REPUBLIC, July 19, 2004, at 32 (book review); L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEXAS L. REV. 855 (2005) (book review). But see Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653 (2005) (book review) (reviewing the book more favorably); Norman R. Williams, *The People's Constitution*, 57 STAN. L. REV. 257 (2004) (book review) (same). While I touch on these issues in passing, a full evaluation of Dean Kramer's broader historical and prescriptive claims are beyond the scope of this Article.

28. See, e.g., McGinnis, *supra* note 1, at 489 (highlighting differences between the Warren and Rehnquist Courts' jurisprudence and noting that the Warren Court "preferred to generate social norms based on a more top-down vision of civic order"); cf. L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 675 (2003) (reviewing MARK TUSHNET, *THE NEW*

contemporary Court has defended its own interpretive authority and rejected the handiwork of legislators, regulators, and other jurists is—if not quite unprecedented—still astounding. This trend is further underscored by the Court's more cautious, though still assertive, rebuke to the Bush administration's invocation of unique and allegedly unreviewable powers in the aftermath of the 9/11 attacks.²⁹ When legal historians of future generations tell the story of the current Court, one of their central tasks will be to explain how and why the modern Court came to embrace an often combative court-centered constitutionalism.

As others have noted, however, to describe the current Court's ideology as reflecting a commitment to "judicial supremacy" is something of a non sequitor.³⁰ While the Court's commitment to a robust judiciary and willingness to step on the toes of other political and judicial actors is a salient and historically relevant trend, it tells us little, if anything, about the substantive content of the Court's rulings, let alone about any overriding political, philosophical, or jurisprudential predilections that might have produced those rulings. Even in the sophisticated hands of Dean Kramer, who carefully explores the jurisprudential ramifications of the recent slippage towards judicial supremacy, the Court's vision of its own authority to interpret the Constitution is only a single, not particularly predictive vector in a complicated "intellectual matrix."³¹

Moreover, those who would focus our attention on the Court's penchant for hoarding interpretive authority must confront a striking anomaly in the Rehnquist Court's jurisprudence. Put bluntly, the same Court that has given us *Bush v. Gore*,³² *Board of Trustees of the University of Alabama v.*

CONSTITUTIONAL ORDER (2005)) ("[L]ike the Warren Court, the Rehnquist Court has been willing to overrule.").

29. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

30. See, e.g., Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1921 (2003) (dismissing "judicial supremacy" as "a term of splendidly indefinite content"). Professor Rubenfeld also criticizes the concept of judicial sovereignty at length. He states:

The trouble with the "judicial sovereignty" account is that it has little explanatory power. Any case that finds anything unconstitutional can be attacked as an exercise of "judicial sovereignty." Virtually every time the Court strikes down a federal statute, the Justices implicitly assert the constitutional supremacy of their judgment, together with the view that the other "branches do not have equal standing to interpret the text." Imputing an anti-Congress animus to the present Court, or a disdain for all other political actors, while certainly consistent with every case in which the Court has struck something down, tells us little about why the Justices have struck down the particular laws they have (the number of which remains infinitesimal compared to the total amount of legislation and regulation in force). Explaining everything, the "judicial sovereignty" view explains nothing.

Rubenfeld, *supra* note 1, at 1163.

31. Kramer, *supra* note 1, at 160.

32. 531 U.S. 98 (2000).

Garrett,³³ *City of Boerne v. Flores*,³⁴ *United States v. Morrison*,³⁵ and other ringing endorsements of judicial supremacy, has worked assiduously to limit the power of courts to adjudicate run-of-the-mill civil disputes. In case after case and in wildly divergent areas of the law, the Rehnquist Court has expressed a profound hostility to litigation. Sometimes this theme is expressed overtly—for example, in decisions that drastically shrink the universe of federal statutes that individuals can seek to enforce through private lawsuits,³⁶ tighten the conditions under which successful litigants can recover damages or attorney's fees from governmental malefactors,³⁷ countenance procedures that funnel claims out of the court system and into private dispute resolution mechanisms,³⁸ or impose new limitations on the scale of punitive damage awards.³⁹ At other times, such as in the Eleventh Amendment and preemption contexts, the Court's hostility to litigation bubbles just below the surface, explaining and justifying decisions that on their face seem to turn on other concerns.⁴⁰ Moreover, the hostility of the Court to the litigation enterprise is so pronounced, and so visceral, that it has even played a significant role in reshaping the methodologies the Court employs when interpreting statutes and, to a lesser extent, the Constitution.⁴¹ Indeed, a plausible case can be made that the vehemence with which the Court's majority reacted to the Florida Supreme Court's decisions in the 2000 presidential election cases stems as much from their hostility towards

33. 531 U.S. 356 (2001).

34. 521 U.S. 507 (1997).

35. 529 U.S. 598 (2000).

36. See *infra* subpart III(A).

37. See *infra* subpart III(B).

38. See *infra* subpart III(C).

39. See *infra* subpart III(D). This list is purely by way of example. The Court's hostility to litigation bubbles to the surface in innumerable and widely varied contexts.

Interestingly, justiciability, an area that was once seen as a primary battleground in the effort to cut back on litigation, has remained largely dormant over the last decade. Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 589–90 (1992) (Blackmun, J., dissenting) (reading the majority's resolution of the case as portending a major shift in the Court's approach to justiciability) with *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000) (overturning a lower court decision that sought to enforce strict standing and mootness requirements on citizen suits seeking to enforce environmental protections); *FEC v. Akins*, 524 U.S. 11 (1998) (allowing citizen suits to enforce election laws under a statutory right-granting provision similar to the one the Court refused to credit in *Lujan*). But cf. *Kowalski v. Tesmer*, 543 U.S. 125 (2004) (finding that attorneys lack third-party standing to challenge Michigan's broad new limitation on the right to appointed counsel); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (utilizing a novel prudential standing analysis to find a controversial Establishment Clause claim nonjusticiable). Note that the Michigan law at issue in *Kowalski* was struck down several months later when challenged by proper Article III plaintiffs. *Halbert v. Michigan*, 125 S. Ct. 2582, 2594 (2005).

40. See *infra* Part IV.

41. See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (identifying and providing a name for new trends in statutory interpretation); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (providing a leading academic defense of new interpretive methodologies and tying the validity of these methodologies to the current Court's understanding of the proper judicial role).

the role the Florida Supreme Court carved out for itself in resolving the dispute as from the political valence of the state court decision.⁴²

This Article attempts to add another layer to our understanding of the Rehnquist Court. In so doing, it argues that it is impossible to understand the Court's complicated intellectual matrix without acknowledging and assimilating the Court's hostility towards the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice. It also argues more cautiously for the proposition that—while a reinvigorated federalism, an agenda-driven conservatism, and a constitutionally fixated judicial supremacy are all part and parcel of the legacy of the Rehnquist Court—hostility to litigation⁴³ has been, in the end, the most historically significant and all-encompassing theme of the Rehnquist era.⁴⁴

42. See *infra* Part V.

43. In describing this current in the Court's jurisprudence as "hostility" to "litigation," both terms have been chosen with care. For an extended discussion of how and why I chose my terms, see *infra* Part II(B). A few other scholars have adopted the same construction in explaining aspects of the Rehnquist Court's jurisprudence, although only one has provided any serious substantive explanation of her meaning. See Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 706–19 (2000) (locating the Supreme Court's 1999 sovereign immunity decisions in the context of a variety of other anti-litigation initiatives of the Rehnquist Court and offering the Court's "hostility to litigation" as one of many overlapping themes motivating those decisions).

44. In justifying these propositions, I am forced to contend not only with alternative thematic explanations of the Rehnquist Court's jurisprudence, but also with a recent strain of commentary suggesting that—for a variety of reasons—the task of seeking an overarching "ideational" explanation for the Rehnquist Court's jurisprudence is incoherent or futile. See, e.g., Merrill, *supra* note 1, at 571 (rejecting an "ideational approach" to understanding the Rehnquist Court because it fails to accommodate a variety of the Court's holdings). Some have attacked the idea that the years of the Chief Justice's tenure represent a single era. See, e.g., *id.* at 569 (observing that legal scholars "can already perceive that there have been two Rehnquist Courts"); Chemerinsky, *supra* note 1, at 659 ("In its first years, the Rehnquist Court invalidated few laws and professed an approach to constitutional law that exalted majoritarianism. In the last decade, however, the Court has invalidated statutes at an unprecedented rate and has rarely deferred to Congress, to the Executive, to state legislatures or to state courts."); Erwin Chemerinsky, *The Constitutional Jurisprudence of the Rehnquist Court*, in THE REHNQUIST COURT: A RETROSPECTIVE, *supra* note 1 at 195, 196 (contrasting the staunchly majoritarian decisions of the early court to the more recent decisions); *infra* subpart II(A) (participating in that debate). Others have questioned whether the Chief Justice's name properly belongs on the era given the influential role others have played in the Court's deliberations. See, e.g., Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877, 877 (2001) (describing the current Court as the "O'Connor Court"); Warren Richey, *The Quiet Ascent of Justice Stevens*, CHRISTIAN SCI. MONITOR, July 9, 2004, at A1 (arguing that Justice Stevens quietly led the Court on important issues during the 2003–2004 term); Cliff Sloan, *In Praise of John Paul Stevens*, NEWSWEEK, May 6, 2005, <http://www.msnbc.msn.com/id/7748622/site/newsweek> (arguing that it is increasingly clear that this is the "Stevens Court"); cf. Greenhouse, *supra* note 2 (commenting that the 2003–2004 term may "go down in history as the one when Chief Justice William H. Rehnquist lost his court"). Still others have challenged the assumption that there is anything particularly revolutionary about the era. See, e.g., MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 93 (2003) (expressing skepticism about attempts to characterize the Rehnquist Court as "revolutionary"); Powe, *supra* note 27, at 889 (commenting that the Rehnquist Court did nothing more profound than simply follow

This Article proceeds in five parts. In Part II, I extend the work of the introduction, defining my terms, explaining my argument, and offering preemptive defenses against some predictable misreadings of my thesis. In Part III, I unpack the contours of the Rehnquist Court's hostility to litigation, focusing attention on a number of areas where the Court has acted aggressively and explicitly to limit the scope or availability of litigation: remedies and rights of action, qualified immunity and attorney's fees, the enforceability of mandatory arbitration agreements, and limitations on the permissible scope of punitive damage awards. I then move from the explicit to the implicit, examining well-rehearsed areas of the Court's jurisprudence in an effort to identify the subtle effects of the Court's reflexive hostility to litigation on its constitutional docket. Part IV explores the interaction of the Court's commitment to federalism and its hostility to litigation; this Part argues both that the Court's hostility to litigation fanned the flames that provoked the last decade's Eleventh Amendment revolution and that the Court's reluctance to countenance broad civil remedies even when imposed by sovereign states has served to impose limits on the Court's federalism jurisprudence. Part V tackles the Court's über-controversial decision in *Bush*

"election returns"); Keith E. Whittington, *William H. Rehnquist: Nixon's Strict Constructionist, Reagan's Chief Justice*, in REHNQUIST JUSTICE, *supra* note 1, at 8 (noting that, despite his long tenure, Rehnquist's constitutional vision has never "quite captured the Supreme Court"); Young, *supra* note 1, at 1213–14 (rejecting attempts to characterize the Rehnquist Court as a hotbed of "conservative judicial activism" as inconsistent with the reality that the Court "has generally respected precedent—even when that precedent points in politically liberal directions"); Hamilton, *supra* note 20 (arguing that the Rehnquist Court is clearly "centrist"—and not the radical "arch-conservative" body it is "wrongly caricatured as being"). I take those claims on—and moderate my thesis to account for them—in detail in Part II and in passing throughout the Article.

By far the most challenging strand of the recent skepticism about thematic analyses of the Rehnquist Court is the suggestion that, because the Court's work is too dense and nuanced to be "subsumed under any single conceptual rubric," scholars of the current Court should instead pursue a micro-analysis of individual Justices' policy preferences, strategic considerations, and interpersonal relationships. Merrill, *supra* note 1, at 571; *see also* TUSHNET, *supra* note 1 (analyzing the Rehnquist Court through the assumption that the current Justices, including the Court's conservative majority, are hopelessly divided on first principles of constitutional law and constitutional interpretation and that, as a result, the Court's work product reflects strategic compromise and accidental overlaps rather than any grand theme); *cf.* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4 (2003) (manifesting a similar skepticism as to the utility of some of the recent Rehnquist Court scholarship, albeit in a critique that proposes that we deepen our analyses of the current Court by ratcheting up the scope of our inquiry to include an examination of the current Court's (mis)understanding of the boundaries of constitutional law and of the relationship between law and culture rather than ratcheting down the scope of our analysis as Merrill suggests). I take Professor Merrill's methodological criticism seriously and hope that this Article approaches its thematic analysis in a refined and humble way. Nonetheless, my approach is unabashedly ideational—I tell a story about the Rehnquist Court in which a single intellectual impulse carries substantial explanatory power. I hope that my refinements of the ideational approach—in particular my assessment that the driving force of the Rehnquist Court's anti-litigation fervor is not an idea per se, but rather a dense and under-theorized cultural impulse—will win over some who are skeptical about thematic assessments of this (or any other) Court. In the end, however, this Article is an intervention in the ongoing debate about the dominant themes of the Rehnquist Court and may prove unsatisfying to those who reject such an approach.

v. Gore,⁴⁵ arguing that skepticism about the litigation enterprise both fueled the Court's startling foray into presidential selection and shaped the content of the Justices' rushed and often cryptic opinions. Finally, in a brief Part VI, I pull back from the cases to interrogate the sources of the Court's hostility to litigation, exploring not only the reasons for that hostility but also its curious coexistence with the Court's concurrent commitment to an aggressive form of judicial supremacy, particularly in the constitutional arena.

My conclusions are neither simple nor startling. As I read our recent judicial past, the nine judicial actors who sat together on the Supreme Court for the last decade shared genuine affinity for the work they and their lower court colleagues perform and for the profession at whose apogee they rank.⁴⁶ That pride notwithstanding, however, the Court's decisions manifest a studied ambivalence toward the powers of the judiciary and the role of the legal system over which judges reign. Whether one is examining the Rehnquist Court's rhetoric or its results, themes of judicial supremacy share center stage with themes of judicial self-abasement. This tension is not unprincipled; indeed, at some level, it may even be intentionally dialectic. Nor, however, is it fully theorized or fully consistent. It is the product of discrete political, intellectual, and cultural forces that will take decades of historical study to fully untangle. And it is the lead storyline in the history of this peculiar and peculiarly interesting Court.

II. Defining the Project

A. *Periodizing the Rehnquist Court*

Any attempt to explain the salient themes of the Rehnquist Court must deal with the fact that its subject ("the Rehnquist Court") is not a static entity but instead a moving target—evolving, changing, and providing new evidence continuously over a period of almost two decades. Given the possibility—most would say, the certainty—of change over time, it behooves a scholar of the Rehnquist Court to offer an explanation of the chronological reach of his or her thesis.

Most scholars break the history of the Chief Justice's tenure down into at least two eras.⁴⁷ The first began, naturally, with his appointment in June 1986 and lasted until Justice Stephen Breyer joined the Court in the fall of 1994. This is a period characterized by constant flux in the Court's

45. 531 U.S. 98 (2000).

46. For an astute discussion of the odd pride the current Justices take in their "seriousness" and professionalism, see Powe, *supra* note 28, at 672 ("Judicial seriousness is a best-face projection by the Justices."). Respect for the institution of the judiciary—if not for its traditional powers—was, according to many, a central theme in the legacy of Chief Justice Rehnquist. See, e.g., Editorial, *A Defender of Independent Courts*, N.Y. TIMES, Sept. 7, 2005, at A21.

47. See, e.g., Merrill, *supra* note 1, at 569–71 (discussing the "first" and "second" Rehnquist Courts).

membership,⁴⁸ scattered and unpredictable majority coalitions, and an intense but unfocused attack on the leading precedents of predecessor Courts. The “Second Rehnquist Court”⁴⁹ began with the appointment of Justice Breyer and arguably lasted until the Chief Justice’s death during the 2005 summer recess. This period, in contrast to the earlier Rehnquist days, is characterized by stability in personnel,⁵⁰ predictable voting patterns, and relatively consistent juridical themes.

Some commentators have begun to posit the possibility that a “Third Rehnquist Court” emerged over the last several terms of the Chief Justice’s tenure.⁵¹ Though the defining characteristics of such a Court, if it even existed, remained imperfectly realized, careful observers have noted that over the last few years the Court has begun to mark off the limits of its most aggressive doctrinal innovations,⁵² that voting coalitions have become increasingly fluid,⁵³ and that the more liberal and moderate Justices have

48. New Justices joined the Court for six of the eight terms during this era. *See id.* at 577.

49. *See id. passim.*

50. No new Justice joined the Court between the arrival of Justice Breyer and the death of Chief Justice Rehnquist. This is the longest amount of time that a nine-member Court has ever stayed together. *See* Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 MINN. L. REV. 131, 134 & n.12 (2001) (discussing the longest gaps in history between the seating of new Justices). While the Rehnquist Court has, in a literal sense, expired with the passing of its namesake, only time will tell if its central themes (including hostility to litigation) live on. Early predictions are that the substitution of John G. Roberts for William Rehnquist as Chief Justice will do little to soothe the Court’s hostility to litigation. *See, e.g.,* Dahlia Lithwick, *Humble Pie: Why Does John Roberts Hate Courts So Much?*, SLATE, Sept. 2, 2005, <http://www.slate.com/id/2125469/?nav/ais/> (discussing John Roberts’s writings and career and concluding that he “sees almost no role for courts as remedial institutions” and “has made it his work to try and hobble the courts”).

51. *See generally supra* note 44 and sources cited therein (discussing the argument that, in recent terms, the Supreme Court has increasingly been led by moderate or liberal Justices and deviated from the themes and ideas of Chief Justice Rehnquist).

52. *See, e.g.,* *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005) (holding that the condemnation of private property of one owner for use of a second owner is not precluded by the Takings Clause if the transaction is part of an economic development program considered to be in the public interest by relevant local regulatory authorities); *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005) (holding that the federal government has authority under the Commerce Clause to regulate intra-state possession of marijuana even if the drug is held for medicinal use under procedures authorized by state law); *Tennessee v. Lane*, 541 U.S. 509, 515 (2004) (holding that the Eleventh Amendment is not a bar to individuals suing states under Title II of the Americans with Disabilities Act when state court facilities are not accessible to the handicapped); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 725 (2003) (holding that, the Eleventh Amendment notwithstanding, states are liable for damages for violating the Family and Medical Leave Act because Congress validly abrogated states’ sovereign immunity pursuant to Section 5 of the Fourteenth Amendment); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (holding that temporary development moratoria enacted to allow for reasoned land-use planning do not require compensation under the Takings Clause).

53. For example, during the last term of the Rehnquist Court (October Term 2004), the Court’s five most conservative Justices voted together in only 21% of the 5–4 decisions (five out of twenty-four), a strong contrast from previous terms where that alignment routinely accounted for half or even two-thirds of the 5–4 decisions. Interestingly, however, a surprisingly small number of the remaining 5–4 decisions (eight) were made up of majorities consisting of the four most liberal

become increasingly able to put their most pressing concerns on the Court's agenda.⁵⁴

Like most Rehnquist Court scholars, my focus is largely on the Second Rehnquist Court, the decade-long stretch in which the Chief Justice and his ideological allies were able to assemble consistent majorities for predictable results in a recurring set of important doctrinal areas. This was the decade that spawned most of the cases that will form the Chief Justice's legacy. It was also the rare instance of what might be deemed a "mature court"—nine Justices sufficiently familiar with each other's passions and concerns to engage in long-running jurisprudential conversations, often without direct prompting or regard to the specific subject matter at issue.⁵⁵ In rough cut, one might suggest that the years prior to 1994 represent rehearsal and experimentation with the agenda for the Rehnquist Revolution, the period from 1994 until 2002 or 2003, the years of the Revolution, and the years since then a period of consolidation or retrenchment.

While I largely agree with the prevailing periodization, one of the virtues of the theme on which I focus—hostility to litigation—is that it illuminates a number of points of contact between the jurisprudence of the First and Second Rehnquist Courts. To illustrate the connection, it is worth remembering that once upon a time the suggestion that the prevailing ethos of the Rehnquist Court was motivated by hostility to litigation would have evoked little, if any, surprise. In the months and years immediately following the promotion of Chief Justice Rehnquist in 1986, the Court

Justices and one conservative "defector." Many of the close decisions were instead decided by ad hoc coalitions of Justices, including several alignments never seen before. Altogether, each Justice joined between 12 and 14 of the 24 5–4 decisions. Similarly, in comparison to previous terms, the various Justices dissented in a much more evenly distributed number of cases, with Justices Breyer, O'Connor, and Kennedy dissenting 11 times each; Justice Stevens 21 times; and the remaining five Justices between 15 and 18 times. All statistics are calculated from the wonderful and timely reports posted by the law firm Goldstein & Howe on their "SCOTUS Blog." GOLDSTEIN & HOWE, OT2004 NON-VOTING STATISTICS (2005), <http://www.scotusblog.com/movabletype/archives/FinalOT04NonVotingStats.pdf>; GOLDSTEIN & HOWE, END OF TERM STATISTICS AND ANALYSIS – OCTOBER TERM 2004 (2005), <http://www.scotusblog.com/inovabletype/archives/FinalOT04StatsMemo.pdf>.

54. Most notable are the handful of cases where Justice Stevens was able to put together majorities for positions he had once championed in dissent. *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (overruling prior precedent and holding that the Constitution prohibits the execution of individuals for crimes committed as juveniles); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (overruling prior precedent and holding that the Constitution prohibits states from criminalizing private consensual same-sex sexual activity between adults); *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (overruling prior precedent and holding that the Constitution requires that juries find the facts that trigger eligibility for the death penalty); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (overruling prior precedent and holding that the Constitution prohibits the execution of the mentally retarded).

55. *Cf.* Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1160 & n.38 (2004) (noting that political scientists refer to such a long-serving court as a "natural court"); Merrill, *supra* note 1, at 638–51 (discussing the consequences of membership "stasis" for Court decisionmaking during the Second Rehnquist Court).

directly and consistently moved to limit both access to and the remedial power of the federal courts, often in high profile constitutional litigation.⁵⁶ In small but significant steps, with calm but firm rhetoric, the First Rehnquist Court expressed a desire and an intention to roll back the institutional assertiveness of the federal judiciary. This avowed anti-activist agenda put the Court on a collision course with the legacy of the Warren Court, and court-watchers took note.

As events transpired, the apocalyptic confrontation between Warren Court “activism” and Rehnquist Court “restraint” never came to fruition. *Miranda*, *Roe*, and *Bakke* survived furious challenges,⁵⁷ the full Court embraced substantive due process,⁵⁸ and institutional reform litigation limped on—hampered by the decisions of the Court, statutory reforms, and a change in the national zeitgeist, but still an accepted and formidable weapon for advocates and reformers.⁵⁹ Where the Rehnquist Court did innovate—for example, in the Eleventh Amendment, Commerce Clause, or freedom of association contexts—issues of judicial power were rarely in the forefront of the conversation. Indeed, the Court’s alacrity in striking down federal and state statutes and its disdain for the considered judgment of non-judicial

56. See, e.g., *Martin v. D.C. Court of Appeals*, 506 U.S. 1, 1 (1992) (closing the Court’s *in forma pauperis* docket to litigants who have allegedly abused the Court’s processes through frequent filings); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–62 (1992) (imposing sharp new standing limits); *Freeman v. Pitts*, 503 U.S. 467, 471 (1992) (curtailing the availability of remedies in school desegregation cases); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 240 (1991) (same); *Missouri v. Jenkins*, 495 U.S. 33, 37 (1990) (same); *Spallone v. United States*, 493 U.S. 265, 267 (1990) (precluding judges from imposing sanctions on legislators for failing to pass legislation funding court-ordered housing desegregation efforts); *In re McDonald*, 489 U.S. 180, 180 (1989) (like *Martin*, closing the Court’s docket to litigants who have abused the Court’s processes through frequent filings).

57. See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (endorsing Justice Powell’s qualified acceptance of affirmative action in *Regents of University of California v. Bakke*, 438 U.S. 265, 271 (1978), and validating continued use of affirmative action under certain circumstances); *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (maintaining the rule in *Miranda v. Arizona*, 384 U.S. 436 (1966), and stating that the rule is “constitutional”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (preserving the “essential holding” of *Roe v. Wade*, 410 U.S. 113 (1973)).

58. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65, 77, 80, 86, 92, 95 (2000) (including opinions signed by all nine Justices accepting that “substantive due process” exists and protects certain conduct from government regulation); *Washington v. Glucksberg*, 521 U.S. 702, 719, 736, 741, 756, 789, 790 (1997) (same).

59. See generally Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving!*, 58 U. MIAMI L. REV. 143, 145 (2003) (disputing the idea that the structural reform injunction will cease to exist by citing the existence of “sufficiently egregious, systematic constitutional issues that inspire (or could inspire) the requisite breadth of support and depth of reformist zeal to motor the machinery of the structural reform injunction”); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1020 (2004) (arguing that the emergence of the experimentalism model in public law litigation further bolsters the role of the judiciary in the recognition and enforcement of such rights); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2036 (1999) (affirming the legitimacy of institutional reform litigation, in particular that of prisons, as a political practice rather than as a judicial movement).

actors turned the early Rehnquist Court's skepticism about the scope of judicial power into easy fodder for the Court's critics.⁶⁰

It is my thesis that the anti-litigation spirit of the early Rehnquist Court did not die, but instead was redirected into lower profile areas of litigation, employed more subtly in higher profile cases, and complicated by the Court's increasing confidence in its own ability to resolve constitutional disputes. Though the day-to-day commentary on the Court lost track of the theme, litigation hostility remained a powerful force shaping the Court's basal understanding of its institutional project.

B. Defining "Hostility" and "Litigation"

In describing this current in the Court's jurisprudence as "hostility" to "litigation," both terms have been chosen with care. By "hostility" I mean to suggest an attitudinal orientation against litigation, an instinctive skepticism that is triggered whenever the proposed disposition of a case requires the extensive, aggressive, or creative use of the courts or the judicial power. While other terms might be substituted without doing substantial violence to my argument—try on skepticism, distrust, perhaps even ambivalence—hostility best captures and reinforces the fact that the phenomenon in question is both emotional and intellectual. The members of the Court are on some level aware of this strand in their jurisprudence and write about it, debate it, and rationally argue about it. On the other hand, there is a profound visceral component to the Court's orientation towards litigation—an inchoate, under-theorized, instinctive reaction. In the language of history, the Court's hostility to litigation is as much a cultural phenomenon as an intellectual one.

As for the object of the Court's hostility, I mean "litigation" to be understood broadly. I include within the target of the Court's skepticism both the decision by particular individuals or groups to resolve problems and seek redress through formal application to the courts and the complex of individuals, institutions, and practices through which such disputes are adjudicated.⁶¹ More specifically, I mean to reference the social institution of litigation (call it capital-L "Litigation" if you prefer)—the complex of cultural attitudes about problem solving, institutional arrangements, doctrinal rules, and professional roles that nourish our particular judicially focused dispute-resolution system.

60. The contrast is so pronounced that some commentators made mention of it in their obituaries for Chief Justice Rehnquist. See, e.g., Greenhouse, *supra* note 4, at A1 ("[T]he court's institutional enhancement was an irony of Chief Justice Rehnquist's tenure, because another goal that he accomplished in large measure was to shrink the role of the federal courts by taking them out of the business of running prisons, school systems, and other institutions of government.").

61. This Article does not address, except tangentially, the Rehnquist Court's attitude towards administrative proceedings.

Though I see the institution of Litigation writ large as the Court's target, the Court's hostility manifests itself differently in different areas of the law. Sometimes it comes across as an overt inclination to close the courts to particular kinds of claims or claimants, at other times as skepticism about doctrinal innovations that might have the immediate or second-order consequence of facilitating litigation. Sometimes it comes dressed as an attack upon the equitable power of the judiciary, at others it is wrapped up in a broad critique of strategies of judicial interpretation that seem to privilege the courts at the expense of other social and political institutions. The common thread throughout is doubt in the efficacy of a lawsuit as a mechanism for resolving the problem at hand, coupled perhaps with a disproportionate animosity towards those who believe otherwise.

C. *The Limits and Scope of My Thesis*

This Article builds on the work of a number of scholars who have begun to recognize the Rehnquist Court's propensity for denigrating common law rulemaking, curtailing the remedial options available to courts and litigants, and more generally manifesting an unwillingness to "take responsibility for shaping a workable legal system in the everyday disputes that come before the judiciary without great fanfare."⁶² However, I part company with the others who have focused attention on these issues in several important ways. First, I suggest that these themes reach more deeply into the fabric of the Court's jurisprudence than others have hypothesized. While others who have begun to develop similar themes have tended to focus on one or two areas of law, my analysis identifies manifestations of the Court's hostility to litigation throughout the Court's jurisprudence—at times on the face of the opinion but often just beneath the surface. More specifically, while the others have focused exclusively (or nearly so) on the Court's nonconstitutional docket,

62. Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343 (2002). See also Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (arguing that "the Court has launched a wholesale assault on one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general"); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224 (2003) (arguing that the Rehnquist Court has "revised the scope of federal equitable and common law powers" and that the holdings of recent Supreme Court cases "instruct federal judges not to craft remedies without express congressional permission, and, when permission has been granted, to read it narrowly"); Sabel & Simon, *supra* note 59, at 1020 ("Although key decisions of the Rehnquist Court sometimes seem unreflectively hostile to public law litigation, they are plausible in their demand that lower courts demonstrate stronger connections between the principles on which their determinations of liability are based and the specific means they impose as remedies."); Peter Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 898 (2002) ("The Justices of the Supreme Court, then, face a considerable temptation to follow Justice Scalia into relatively simple, either-or, bright-line rules—approaches that avoid the rich contextualism and modesty of classic common law reasoning, yet might from the Court's perspective seem to promise control over adventurism in the lower echelons of the federal judiciary."); cf. Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 623 (2005) (discussing, in the context of a case the Rehnquist Court ultimately dodged, the Court's increasing hostility to private actions brought to enforce public values).

this Article demonstrates that the Court's skepticism about the utility and propriety of litigation solutions influences its decisions in high-profile constitutional litigation as pronouncedly as it does in run-of-the-mill civil disputes.

Second, this Article rejects the suggestion, propounded—perhaps unwittingly—by those who describe this theme as involving “judicial passivity”⁶³ or the “scope of federal [courts’] equitable and common-law powers,”⁶⁴ that the current Court’s actions in these cases can be reduced to the staking out of a position in a methodological dispute between jurists. Instead, I propose a hostility to litigation that is more deeply rooted and more profound than that characterization would imply. In my reading, the mature Rehnquist Court possessed an attitudinal orientation against litigation that interacted with doctrine and judicial philosophy but which resided in a deeper, more guttural place. Though this hostility competed with and coexisted with other themes and impulses, it was omnipresent in the complex soup of internal factors that motivated the Justices in individual cases and baked into the rhetorical and doctrinal language in which they debated and justified their decisions.⁶⁵

Though the contours of this hostility will become clear in the ensuing pages, it is useful to note at the outset what this Article is not arguing. First, the Court’s hostility to litigation cannot be reduced to politically motivated antipathy for tort plaintiffs, employment discrimination complainants, trial lawyers, or any of the other favorite targets of modern right-wing politics. While I do not discount the possibility that personalized distaste for trial lawyers or tort plaintiffs plays a substantial role in shaping the Court’s attitudes, it does not provide a sufficient explanation for a jurisprudential phenomenon that rears its head in a variety of contexts unrelated to or even hostile to the contemporary anti-plaintiffs law crusade.

Moreover, to the extent that a careful reading of the Rehnquist Court’s decisions suggest linkages between the Court’s hostility to litigation and the Justices’ instinctual distaste for the modern plaintiffs’ bar, I do not assume that these connections stem directly or even principally from partisan politics. The frequent participation—and occasional leadership—of the Court’s more liberal members in shaping a Court fundamentally hostile to litigation demands a more nuanced explanation. To the extent that the

63. Meltzer, *supra* note 62, *passim*.

64. Resnik, *supra* note 62, at 224.

65. In a 2000 symposium essay, Vicki Jackson noted the Rehnquist Court’s “hostility to litigation” and spent several pages sketching out some evidence of the theme. See Jackson, *supra* note 43, at 706–19. Though we select largely different examples to illustrate our points, our (independently derived) accounts are largely in accord. That having been said, Professor Jackson’s discussion—like the others distinguished in this Part—offers a less ambitious account of the Court’s skepticism towards the litigation enterprise, one that both focuses largely on cases where the Court is directly denying access to the courts and accords such hostility only limited explanatory power even within those cases.

Rehnquist Court's hostility to litigation reflects prior ideological commitments that bias them against certain segments of the bar or certain categories of litigants, those commitments are just as likely to stem from the Justices' class position or professional and educational experiences as from their partisan political allegiance.⁶⁶

Second, the Court's hostility to litigation is not motivated in any significant way by the belief that it is Congress's role to create remedies. While separation of powers rhetoric dots the Court's opinions, the parsimony with which the Rehnquist Court doles out the remedial loaf is manifest in decisions interpreting congressionally created remedies as well as decisions denying implied remedies. Indeed, in areas such as qualified immunity, the Rehnquist Court has often erected elaborate judicially created barriers to recovery under statutes that appear to promise much greater relief. Similarly, the Court's skepticism about judicial exercise of equitable power is not placated in cases where such power is expressly authorized by statute or state constitutional provision.

III. The Contours of the Court's Hostility to Litigation

Any survey of the Rehnquist Court's hostility to litigation, however cursory, must begin with the obvious: In myriad ways, the Court has made life very difficult for civil plaintiffs.⁶⁷ To take but a few examples, the Court has narrowly construed statutes and case law to reduce and eliminate remedial options. It has protected governments and governmental officials from financial liability through expansive immunity doctrines and cramped interpretations of the federal fee-shifting statutes. It has consistently enforced form arbitration agreements that shift cases from courts to alternative forums without regard for the practical consequences to potential

66. All nine of the Justices of the late Rehnquist Court were graduates of elite schools with either little practice experience or practice experience largely limited to constitutional litigation or defense-side civil litigation. For a brief discussion of the implication of these facts for the direction of the Rehnquist Court, see *infra* subpart VI(B).

67. The reach of this Article is limited to civil litigation and purposefully excludes discussion of habeas corpus law which, while nominally civil, is substantively about criminal law and criminal trials. That having been said, some of the themes addressed herein have substantial applicability in the criminal arena. To take the obvious example, the Court has validated or created innumerable procedural obstacles that habeas petitioners must scale before bringing the merits of their claims to the attention of the federal courts, a parallel path of judicial hostility that has been noted by many commentators. See, e.g., Jackson, *supra* note 43, at 707–08 (discussing habeas cases as an example of the Rehnquist Court's "hostility to litigation"). To take a more obscure example, some of the Court's decisions interpreting the scope of the Sixth Amendment right to counsel demonstrate a Court unaware of the actual interactions of lawyers and clients in our contemporary criminal justice system and "refus[ing] to take responsibility for shaping a workable legal system," Meltzer, *supra* note 62, at 343, to resolve criminal justice matters. See, e.g., *Texas v. Cobb*, 532 U.S. 162 (2001) (holding—in conflict with norms and policies in virtually every locale—that a client represented by a lawyer on a burglary charge stemming from an incident where a homeowner went missing was "unrepresented" with regard to a charge of murdering the missing woman and could thus be interrogated outside the presence of his lawyer without violating the Sixth Amendment).

plaintiffs. And it has birthed novel constitutional limitations on the scope of recoverable damages.

This Part analyzes the Court's recent decisions in each of those four areas. These are not the only areas where the Court has acted directly to curtail litigation. Examples to the contrary abound.⁶⁸ These areas are not selected randomly, however. Each has been chosen because it demonstrates something important about the scope and shape of the Court's hostility to litigation. Rehearsing the decisions in these four areas gives life and breath to a theme that might otherwise appear little more than an arid slogan. That is the mission of this Part.

A. A Reluctance to Afford Remedies: The Paradigm Cases

Among the many areas where the Rehnquist Court has manifested hostility to litigation, its narrow construction of statutes and case law defining the remedial options available to civil litigants is among the most pronounced.⁶⁹ Even a cursory examination of the Rehnquist Court's docket reveals that a substantial percentage of the Court's cases in recent years have dealt with the scope and availability of remedies for violations of various federal statutes, of federal common law, of state statutes arguably preempted by federal law, and of rights protected by the United States Constitution.⁷⁰ The majority of such cases are decided in lawyerly opinions of modest ambition employing standard tools of statutory interpretation and historical analysis.⁷¹ In a significant minority of cases, however, the Court has gone beyond the details of the dispute in question to explain and debate more fundamental issues of remedial authority. These cases present a striking microcosm of the Rehnquist Court's jurisprudence.

Though the forthright debate over broad remedial questions has been the centerpiece of several dozen Rehnquist Court decisions,⁷² a quartet of cases

68. A partial list of other areas with relevant decisions might include justiciability (*but see supra* note 39), habeas corpus (*but see supra* note 67), civil actions by prisoners, preemption, and sovereign immunity. For my take on the last two of those, see *infra* Part IV.

69. A small but steady stream of scholarship has ably documented the Rehnquist Court's parsimony with remedies. For two excellent articles on this subject, see Meltzer, *supra* note 62, and Resnik, *supra* note 62.

70. By my count, the Supreme Court decided a significant issue as to the scope or availability of a statutory remedy, qualified or sovereign immunity, the availability of attorney's fees, preemption, or justiciability in at least twenty-four of the seventy-four cases decided on the merits after oral argument during October Term 2003. The numbers for the prior two terms are similar. Calculations were made by skimming and coding all opinions for each term listed chronologically at <http://www.supremecourtus.gov/opinions/opinions.html>.

71. See, e.g., *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004); *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369 (2004).

72. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (debating the scope of liability under the Alien Tort Claims Act); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (using an historical analysis of courts in equity to deny a preliminary injunction preventing a party from disposing of their assets pending a decision on their contract claim); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (denying recovery of damages

decided between April 2001 and June 2002 nicely illustrates the Court's handling of—and preoccupation with—such cases. On the surface, these cases are importantly different—involving different kinds of remedial issues, different areas of law, and differently situated plaintiffs. When the cases are placed side-by-side, however, those differences are dwarfed by striking similarities in the Court's approach to and resolution of the cases, similarities that speak volumes about the motivating concerns of the Rehnquist Court.⁷³ In many ways, these cases are the paradigm cases of the Rehnquist era, the cases you would assign an outside observer who wanted to quickly understand how the contemporary Court thinks and works. They demonstrate a Court committed both intellectually and viscerally to limiting litigation.

1. *The Cases.*—In the first of the cases, *Alexander v. Sandoval*,⁷⁴ the Court faced the question whether a private right of action exists to enforce federal regulations barring entities who receive federal funds from adopting policies that have the “effect” of discriminating on the basis of race. These “disparate impact” regulations were authorized by Title VI of the Civil Rights Act of 1964⁷⁵ and adopted by the relevant federal agencies immediately after the passage of that Act. Several prior Supreme Court decisions assumed or strongly suggested that such a right of action exists,⁷⁶ every single federal court of appeals has concluded or assumed the same,⁷⁷ and Congress had amended the content of the legislation with the understanding that whatever substance they gave to the statute would be

for teacher-student sexual harassment under Title IX unless a school district official had notice of, and was indifferent to, the teacher's misconduct); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (rejecting private claims of aiding and abetting under § 10(b) of the Securities and Exchange Act of 1934); *Suter v. Artist M.*, 503 U.S. 347 (1992) (holding that § 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980 does not confer a private right enforceable in a § 1983 action). Compare, for example, *Norfolk Shipbuilding & Drydock Corp. v. Garriss*, 532 U.S. 811, 820 (2001) (Ginsburg, J., concurring) (engaging the opinion of the Court sharply on the scope of remedial power because of disagreement with a sweeping aside dropped into an otherwise straightforward opinion in an unexceptional remedial case).

73. Judith Resnik has noted in passing the essential congruity between these cases (and their importance) in a piece that develops themes similar to those raised in this section through a detailed discussion of one of these cases. See Resnik, *supra* note 62, at 232–33.

74. 532 U.S. 275 (2001).

75. 42 U.S.C. § 2000-d (2000).

76. See *Guardians Ass'n v. Civil Serv. Comm'n of N.Y. City*, 463 U.S. 582 (1983) (concluding, though arguably in dicta and through separate opinions of five Justices, that individuals can seek declaratory and injunctive relief to enforce regulations promulgated pursuant to Title VI); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (determining that a private right of action exists to enforce Title VI without differentiating between the statute and its implementing regulations); *Lau v. Nichols*, 414 U.S. 563 (1974) (deciding on the merits a dispute that was legally indistinguishable from the question raised in *Sandoval*).

77. See *Sandoval*, 532 U.S. at 294 n.1 (Stevens, J., dissenting) (listing cases from all circuits but the Eighth).

privately enforceable.⁷⁸ Nonetheless, in a hotly contested 5–4 decision, the Court held that no private right of action exists to enforce the disparate impact regulations.⁷⁹

In *Correctional Services Corp. v. Malesko*,⁸⁰ the Court considered whether a federal prisoner held in a private correctional facility can bring an action for damages against the corporation administering the prison for violation of the Eighth Amendment's prohibition on "cruel and unusual punishment."⁸¹ Though that remedial course seemed authorized by the Court's decisions in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁸² and its progeny,⁸³ the Court held, again 5–4, that a *Bivens* action was not available under the circumstances of the case.⁸⁴

Just six weeks later, in *Great-West Life & Annuity Insurance Co. v. Knudson*,⁸⁵ the Court was required to construe a central remedial provision of the Employee Retirement Income Security Act of 1974 (ERISA)⁸⁶ to determine whether an employee benefit plan could compel a plan beneficiary to make restitution after recovering damages from a third-party tortfeasor. By the same 5–4 margin, the Court narrowly construed the remedial provision to deny a right of recovery,⁸⁷ over two spirited dissents that took issue with the Court's textual interpretation, its use of precedent, its reading of history, and its lack of receptivity to equitable considerations.⁸⁸

Finally, in *Gonzaga University v. Doe*,⁸⁹ the Court considered whether private individuals harmed by violations of the Family Educational Rights and Privacy Act of 1974 (FERPA)⁹⁰ could seek redress under 42 U.S.C. § 1983. Though seven Justices ultimately concluded that no relief was

78. *See id.* at 302 n.9.

79. *Id.* at 293 (majority opinion).

80. 534 U.S. 61 (2001).

81. U.S. CONST. amend. VIII.

82. 403 U.S. 388 (1971) (holding that an action for damages can be brought directly under the Constitution against a federal agent for violation of the Fourth Amendment in the absence of an alternative remedial scheme).

83. *See, e.g., Carlson v. Green*, 446 U.S. 14 (1980) (extending *Bivens* to Eighth Amendment actions).

84. *Malesko*, 534 U.S. at 74.

85. 534 U.S. 204 (2002).

86. That provision provides:

A civil action may be brought— . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a) (2000).

87. *Great-West*, 534 U.S. at 219–20.

88. *See id.* at 221 (Stevens, J., dissenting); *id.* at 224 (Ginsburg, J., dissenting).

89. 536 U.S. 273 (2002).

90. 20 U.S.C. § 1232g (2000).

available under § 1983,⁹¹ the Court was again divided 5–4 on the crucial doctrinal issue: in this case, whether (and under what circumstances) individuals may seek relief for violations of federal statutes under § 1983 without meeting the increasingly stringent standards for establishing that the statute creates an implied private right of action.⁹² Though the Court’s opinion left some ambiguity on the matter, the five-Justice majority appears to have answered the question with a nearly absolute “no,” leaving the remedial value of § 1983 seriously circumscribed.⁹³

2. *Their Similarities.*—These decisions—taken collectively and in concert with others like them—have the effect of imposing new strictures, limitations, and roadblocks on the ability of civil litigants to seek redress in the courts. As such, they provide some direct, albeit quite broad, evidence of the Rehnquist Court’s hostility to litigation. Beyond that, however, their

91. In addition to the five Justices who joined the broad majority, Justices Breyer and Souter would have denied relief, albeit under a narrower theory that would have continued to allow § 1983 suits to proceed in a substantial number of cases where plaintiffs could not sustain the difficult burden of establishing the availability of an implied right of action. See *Gonzaga*, 536 U.S. at 291 (Breyer, J., joined by Souter, J., concurring).

92. See *id.* at 291–92 (rejecting the majority’s importation of private right of action caselaw into the § 1983 context because “the statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance” and declining to “in effect, predetermine an outcome through the use of a presumption—such as the majority’s presumption that a right is conferred only if set forth ‘unambiguously’ in the statute’s ‘text and structure’”); *id.* at 299–303 (Stevens, J., joined by Ginsburg J., dissenting) (arguing that the majority’s opinion has merged the § 1983 analysis with the more stringent implied private right of action analysis and objecting strenuously to that step).

93. See, e.g., *id.* at 290 (majority opinion) (“In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.”); see also *id.* at 299–300 (Stevens, J., dissenting) (arguing that the above-quoted language effectively merges the inquiries). But see *id.* at 284 (majority opinion) (arguing that the § 1983 plaintiffs have one less burden to clear than implied private right of action plaintiffs because once they establish that a statute creates an individual right, implied private right of action claimants must still establish an “intent to create a private remedy”). Whether the decision in this case leaves any actions sustainable under § 1983 that cannot be brought as implied private rights of action likely depends on whether the category of cases where plaintiffs can establish that Congress intended to create a private right but not a private remedy contains any members; given the conflation of the two inquiries in most implied right of action cases, there is a strong possibility that the category is actually a null set. For one student work that frames the question of *Gonzaga*’s reach with particular clarity, see Sasha Samberg-Champion, Note, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838 (2003). According to some academic commentators, the issue is further complicated by the possibility that administrative agencies might attempt to authorize either a federal right or a federal remedy or both as part of their duty to issue regulations interpreting ambiguous federal statutes. See generally Charles Davant IV, *Sorcerer or Sorcerer’s Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613; Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983?*, 69 BROOK. L. REV. 163 (2003); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 163–66 & nn.244–45 (2005). Deep engagement with these issues is beyond the scope of this Article.

language and detail have the potential to reveal a great deal about the shape and intensity of the Court's hostility.

The commonalities between the cases are striking. All four address the basic question of whether a party who has suffered an acknowledged or assumed injury to a defined legal interest may obtain relief under a particular cause of action. In each case, the result is arguably governed by a prior Supreme Court decision suggesting that relief is available, although in all four the status of the prior opinion is itself a subject of debate.⁹⁴ And, in each case, the same 5–4 majority⁹⁵ rejects the implications of the prior caselaw and decides the crucial doctrinal issue against the party seeking access to the courts.⁹⁶

The similarities do not end with those relatively dry narrative facts, but extend to the tone and substance of the opinions. As suggested above, all four treat the preexisting cases arguably settling their issue as second-class precedents, not illegitimate per se but not sufficiently compelling to counsel adherence if they can be read narrowly,⁹⁷ classified as dicta,⁹⁸ or interpreted

94. See *Gonzaga*, 536 U.S. at 280–83 (discussing several relevant cases, particularly *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990)); *Great-West Life Ins. & Annuity Co. v. Knudson*, 534 U.S. 204, 214–17 (2002) (discussing *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66–74 & n.4 (2001) (discussing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and *Carlson v. Green*, 446 U.S. 14 (1980)); *Alexander v. Sandoval*, 532 U.S. 275, 282–83 (2001) (discussing *Guardians Ass'n v. Civil Serv. Comm'n of N.Y. City*, 463 U.S. 582 (1983)).

95. In each of the four cases, Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas signed the majority opinion, with their four more liberal colleagues writing separately and disagreeing vehemently with their analysis. In three of the four cases, the four-Justice block would have allowed the plaintiff access to the courts on the theory he or she proposed, while in *Gonzaga*, the “liberal” bloc was divided on the ultimate result. See *supra* notes 91–93 (explaining the voting alignment in *Gonzaga*).

96. See *Gonzaga*, 536 U.S. at 290 (“In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action. FERPA’s nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education’s distribution of public funds to educational institutions. They therefore create no rights enforceable under § 1983.”); *Great-West*, 534 U.S. at 221 (“[Section] 502(a)(3), by its terms, only allows for equitable relief. We will not attempt to adjust the ‘carefully crafted and detailed enforcement scheme’ embodied in the text that Congress has adopted. Because petitioners are seeking legal relief—the imposition of personal liability on respondents for a contractual obligation to pay money—§ 502(a)(3) does not authorize this action.” (citation omitted)); *Malesko*, 534 U.S. at 74 (“Respondent . . . seeks a marked extension of *Bivens* to contexts that would not advance *Bivens*’ core purpose of deterring individual officers from engaging in unconstitutional wrongdoing. The caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades, forecloses such an extension here.”); *Sandoval*, 532 U.S. at 293 (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.”).

97. See, e.g., *Great-West*, 534 U.S. at 214–15 (reading *Mertens*’s suggestion that restitution is available under the relevant provision to apply only to the type of restitution that could be obtained in traditional equity courts); *Malesko*, 534 U.S. at 70 & n.4 (reading *Carlson*’s approval of a *Bivens* actions against governmental officials for violations of the Eighth Amendment as inapplicable to an

so as to conflict with intervening decisions.⁹⁹ Moreover, each of the four decisions is sweeping in its approach—frankly admitting that it is not simply deciding the remedial issue before the Court but also clarifying existing methodologies and giving guidance to lower courts as to how to interpret other claims of the same type (i.e., implied right of action claims, *Bivens* claims, statutory rights of action, and § 1983 claims).¹⁰⁰ In the course of lending such guidance, each opinion ignores or downplays the importance of the traditional presumption that rights imply remedies and the historic role of the federal courts in insuring that remedial schemes are sufficient to protect federal rights.¹⁰¹

identical action against private corporations managing public prisons because the policy considerations supporting such an action in the former case are allegedly absent in the latter); *Sandoval*, 532 U.S. at 282–85 (reading each of the potentially controlling Court authorities narrowly).

98. See, e.g., *Great-West*, 534 U.S. at 215 (describing *Mertens*’s statements regarding the availability of restitution under the relevant provision as “dicta”); cf. *Gonzaga*, 536 U.S. at 282 (“Some language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983.”); *Sandoval*, 532 U.S. at 282 (“[T]his Court is bound by holdings, not language.”).

99. See, e.g., *Gonzaga*, 536 U.S. at 280–81 (diminishing the authority of *Wilder* by contrasting its reasoning with “[o]ur more recent decisions”); *Malesko*, 534 U.S. at 68–70 (reading intervening cases as requiring that *Bivens* and *Carlson* be read narrowly); *id.* at 67 n.3 (arguing that the Court has “retreated from” and “abandoned” implied private right of action precedent that was the impetus for the recognition of *Bivens* actions) (internal quotation marks omitted); *Sandoval*, 532 U.S. at 282 (arguing that a decision validating the regulations at issue in the case are “in considerable tension” with later decisions of the Court); cf. *Sandoval*, 532 U.S. at 279 (describing it as an “understatement” that the Court’s “opinions have not eliminated all uncertainty regarding [Title VI]’s commands”).

100. See, e.g., *Gonzaga*, 536 U.S. at 290 (concluding that “if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action”); *Great-West*, 534 U.S. at 220–21 (explaining that when Congress has adopted a “carefully crafted and detailed enforcement scheme” it is the Court’s job to parse that language with exactitude rather than relying on the statute’s general policy objectives and equitable concerns about the general availability of remedies); *Malesko*, 534 U.S. at 74 (summarizing opinion’s explanation that *Bivens* actions are only available where the plaintiff would otherwise be left without a remedy and where the implication of a remedy would deter individual officer’s misconduct and concluding that courts must treat claims “extending” *Bivens* with “caution”); *Sandoval*, 532 U.S. at 286–87 (explaining the current Court’s “particular understanding of the genesis of private causes of action,” and the text-focused, intent-driven methodology that Court has adopted to implement that understanding).

101. Oft-cited expressions of this pro-remedial presumption abound. See, e.g., WILLIAM BLACKSTONE, 3 COMMENTARIES *23 (considering it “a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded”); J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (“It is for the federal courts ‘to adjust their remedies so as to grant the necessary relief’ where federally secured rights are invaded.” (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946))); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803) (asking rhetorically “If he has a right, and that right has been violated, do the laws of his country afford him a remedy?”); see also DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1048 (3d ed. 2005) (“The traditional view was that the intended beneficiaries of a statute could sue for damages from a violation unless the statute implied that such claims should not be allowed. The statute created the right; the common law created the remedy unless the statute negated it.”). For the opinions’ brief attempts to deal with this tradition, see, for

Perhaps most striking of all, each opinion is, for want of a better word, obsessed with the proper role of the federal courts. To that end, each is filled with a full complement of tangential observations, broad assertions, and acerbic jibes.¹⁰² While, to the uninitiated, these observations and asides may appear out of proportion to the issues at stake in the cases, to the members of the Court they are but the latest entries in a familiar and crucially important meta-dialogue about the role of judges and the value of litigation.

3. *Some Lessons.*—

a. Hostility to Litigation That Transcends Subject Matter and Political Valence.—The deep similarities in the way the Court handled these disparate cases strongly suggest that the Court's hostility to litigation transcends doctrinal nicety, subject matter, and political valence. First of all, though all four cases involve the scope and availability of remedies, each comes from a distinct doctrinal area—one dealing with the implication of a private remedy from a federal statute and its attendant regulations (*Sandoval*), another dealing with the implication of a private remedy directly from the Constitution (*Malesko*), a third dealing with a narrow and specific statutory remedy (*Great-West*), and the fourth dealing with the broad and general federal civil rights remedy (*Gonzaga*, interpreting the reach of § 1983). Moreover, as civil cases go, the substance of the four cases could hardly have been more different: one was a broad and aggressive civil rights action,¹⁰³ another, a personal injury tort claim,¹⁰⁴ a third, an action for

example, *Great-West*, 534 U.S. at 220–21, which speculates that the Court's restrictive interpretation of a statute might not foreclose all possible avenues of relief but insists that, even if it does, the choice to close off relief in these circumstances rests with Congress.

102. The most pointed and controversial of these unsurprisingly came from the pen of Justice Scalia. See, e.g., *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.”); *Sandoval*, 532 U.S. at 287 (“‘Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.’” (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment))); *id.* (“Having sworn off the habit of venturing beyond Congress’s intent, we will not accept respondents’ invitation to have one last drink.”); *id.* at 291 (“But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer’s apprentice but not the sorcerer himself.”). These assertive articulations of a limited vision of federal remedial power have spurred not only the vigorous dissents of sitting judges but also a cottage industry of academic criticism. For one particularly critical and insightful discussion of Justice Scalia’s statements in *Sandoval*, see Strauss, *supra* note 62. It is worth noting that—despite his aversion to common law causes of action—Justice Scalia has been willing to “conjure up” common law defenses to statutory causes of action. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (creating, in a majority opinion by Justice Scalia, a non-statutory rule limiting the liability of government contractors); *infra* subpart III(B) (discussing qualified immunity cases).

103. *Sandoval* involved a class-action lawsuit alleging that Alabama’s new policy of giving drivers’ license exams only in English constituted discrimination on the basis of national origin. *Sandoval*, 532 U.S. at 278–79.

damages for a fairly technical violation of a privacy statute;¹⁰⁵ and the fourth, a contractual dispute between several insurance companies and a policyholder.¹⁰⁶ More subjectively, the plaintiffs in the actions seem to evoke very different political sympathies, with the *Sandoval* plaintiffs appealing to traditional “liberal” concerns about ethnic discrimination, the *Great-West* plaintiff appealing to traditional “conservative” concerns about obligation of contract and the efficient provision of services, and the other plaintiffs pulling at heartstrings in more complicated, cross-cutting ways.¹⁰⁷

That the Court would approach these diverse cases in similar ways and would divide over them in identical coalitions tells us a great deal about both the strength and the contours of the Court’s hostility to litigation. To the Justices of the Rehnquist Court, these cases were—first and foremost—cases about the available scope of remedies and the legitimacy of resort to litigation as a mechanism for resolving disputes. Rather than viewing these cases through the prism of their subject matter or their political valence, the Court approached all of them as if they posed identical (disfavored) requests for tickets to litigate. As a result, the Court launched into a predictable set of soliloquies, reflections, and exchanges about the scope of judicial authority and the nature of the judicial function.

The Court’s near-Pavlovian resort to rhetorical set pieces and rehashed debates in these varied cases calls into question some of the more traditional explanations for the contemporary Court’s reluctance to accord remedies. First, while the Court has self-consciously tried to package its more skeptical approach to implied private right of action and *Bivens* cases as a belated acknowledgment of the separation of powers concerns raised by judicially crafted remedies,¹⁰⁸ these cases suggest that the Court’s ire falls

104. Though the issue raised in *Malesko* involved the availability of an Eighth Amendment “cruel and unusual punishment” claim, the underlying litigation was a fairly standard tort action against the operator of the private halfway house for contributing to the heart attack of a prisoner. *Malesko*, 534 U.S. at 64–65 (describing the substantive allegations in the case as raising claims the prison operator was “negligent”).

105. See *Gonzaga*, 536 U.S. at 276–77 (narrating facts and details of the plaintiff’s FERPA claim).

106. See *Great-West*, 534 U.S. at 207–09 (narrating facts of the complicated contractual dispute that eventually gave rise to the statutory issue decided by the Court). It is worth emphasizing that the party thwarted by the Court’s litigation hostility in *Great-West* was a large insurance company while the party who benefited was a quintessential “little guy.”

107. John Malesko was a convicted criminal bringing an Eighth Amendment claim based on his treatment while incarcerated; on the other hand, he was an atypical prison litigant—a middle-aged man convicted of securities fraud and serving his sentence in a halfway house. Brief of Respondent at 1, *Malesko*, 534 U.S. 61 (No. 00-860). John Doe was seeking damages from Gonzaga University for violation of a privacy statute that was largely the product of liberal good government agitation; on the other hand, the alleged violation of his privacy rights involved the revelation that, as an undergraduate, he was accused of sexual misconduct, *Gonzaga*, 536 U.S. at 277, a factual scenario that might play to those who believe that contemporary college campuses produce a substantial number of false allegations of date rape that unfairly tarnish the reputations of young men.

108. See, e.g., *Malesko*, 534 U.S. at 67 n.3 (noting “retreat[]” from an expansive vision of the Court’s authority to imply remedies); *id.* at 75 (Scalia, J., concurring) (describing *Bivens* as a “relic

indiscriminately on those advocating for the availability of a remedy, even when the authority for that claimed remedy is an affirmative congressional enactment. Thus, the Court approaches *Great-West*'s argument for an expansive reading of ERISA § 502(a)(3) with the same presumptive dismissiveness as it approaches attempts to judicially extrapolate remedies from silent statutes. Similarly, in assessing whether and when individuals can use 42 U.S.C. § 1983 to enforce federal statutes against government actors, the Court employs policy-based arguments and tools of construction drawn from the implied private right of action context¹⁰⁹—many of which are premised on concerns relating to the absence of affirmative congressional mandates—while blithely ignoring the countervailing separation of powers concerns raised by precluding actions seemingly authorized by the plain language of § 1983.¹¹⁰ If the Court's symmetrical treatment of these seemingly asymmetrical cases tells us anything, it tells us that something more than mere solicitude for congressional prerogatives is at work in the Court's remedial jurisprudence.

However, it is increasingly clear that the operative principle behind the Court's remedial hostility is not bluntly or categorically political. As noted above, the political valence of these decisions varies dramatically without altering the outcome of the cases. More significantly, in each case, the Court's majority rushes headlong down the path towards its anti-litigation barricades without even assimilating or taking stock of the political or equitable scenery. There is no handwringing over the denial of remedies to plaintiffs with whose claims the conservative Justices would normally sympathize, no sense of reluctance that symmetry or precedent requires an otherwise unpalatable result.

b. Hostility to Litigation as a Phenomenon of the Entire Court.—Consistent 5–4 voting patterns and spirited dissents notwithstanding, these cases illustrate the degree to which hostility to litigation is a phenomenon of the entire Court, not just the five most conservative Justices. Both the substance and the tone of the dissenting opinions in these cases suggest that

of the heady days" when the Court took upon itself powers that properly belonged to the legislature).

109. See generally *Gonzaga*, 536 U.S. at 273 (holding that because FERPA's confidentiality provisions speak only in terms of institutional "policy or practice" and not to individual instances of disclosure, they have an aggregate focus, they are not concerned with whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights; and noting that although the question of whether a statutory violation may be enforced through § 1983 is a different inquiry from that involved in determining whether a private right of action can be implied from a particular statute, the inquiries overlap in that it must first be determined whether Congress intended to create a federal right).

110. See *id.* at 300 (Stevens, J., dissenting) ("[I]mposing the implied right of action framework upon the § 1983 inquiry is not necessary: The separation-of-powers concerns present in the implied right of action context 'are not present in a § 1983 case,' because Congress expressly authorized private suits in § 1983 itself." (citation omitted) (quoting *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990))).

even the more expansive Justices are operating within a conceptual framework in which courts are reluctant to extrapolate remedies and err on the side of closing the courthouse door.¹¹¹ In implied right of action cases, in particular, the center of debate has swung drastically in an anti-litigation direction. In *Sandoval*, as in most other recent cases, all nine Justices adopt an approach that allows for a private right of action only if there is substantial evidence that Congress intended such a remedy.¹¹² Though the Justices disagree mightily over what kinds of evidence to consider and how strong that evidence must be, all accept the modern rule that congressional intent to create a remedy is a *sine qua non* of judicial implication. None defend the traditional rule that courts may extrapolate appropriate remedies from silent statutes so as to effectuate legislative purposes or even the intermediate positions adopted and abandoned by the Court in its three-decade-long retreat from the traditional rule.¹¹³

111. In addition to the material noted in the following footnotes, note the votes of Justices Breyer and Souter in *Gonzaga*. See *supra* note 92 (explaining their votes). Note also Justice Stevens's concessions about implied right of action cases in arguing for a different rule in § 1983 cases, *supra* note 110, and the narrow, precedent-driven arguments advanced by the dissenters in *Malesko*. 534 U.S. at 75–76 (Stevens, J., dissenting) (arguing that the case is controlled by *Carlson v. Green*, 446 U.S. 14 (1980)).

112. See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (“The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative.”) (citation omitted); *id.* at 313 (Stevens, J., dissenting) (“In order to impose its own preferences as to the availability of judicial remedies, the Court today adopts a methodology that blinds itself to important evidence of congressional intent.”).

113. What I call the “traditional” rule was most clearly articulated in *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (“It is for the federal courts ‘to adjust their remedies so as to grant the necessary relief’ where federally secured rights are invaded.” (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946))). See also LAYCOCK, *supra* note 101, at 1048 (explaining and paraphrasing the “traditional rule”). But cf. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 731, 735 (1979) (Powell, J., dissenting) (arguing that “[t]he implying of a private action from a federal regulatory statute has been an exceptional occurrence in the past history of this Court” and calling *Borak* a “break in this pattern”). In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court offered a new test for the availability of an implied private right of action that put a heavier emphasis on express evidence of congressional intent but which still considered such evidence only one of several factors. In *Cannon* the Court moved further, suggesting that congressional intent was the central question in the analysis but not entirely abandoning other considerations. See 441 U.S. at 689 (noting that even though the court considers four factors in determining whether Congress intended a private right of action, whether there is congressional intent to that end is “the threshold question”). The *Cort* and *Cannon* decisions are, in retrospect, largely doctrinal rest stops on the path from a rule conceptualizing the adoption of appropriate remedies as a proper equitable function for the courts to one in which the courts are powerless to extrapolate remedies beyond those that Congress expressly established or clearly intended but simply forgot to memorialize. The first modern decision definitively stating the new rule was issued a month after *Cannon* but not uniformly followed until nearly two decades later. *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 568 (1979) (“[O]ur task is limited solely to determining whether Congress intended to create the private right of action . . .”). My reading of the dissent as adopting this once-radical single factor analysis is echoed by many commentators. See, e.g., LAYCOCK, *supra* note 101, at 1051 (arguing that the dissenters in *Sandoval* “want only an honest inquiry into probable congressional intent, considering all the evidence”).

To a degree that is easily missed if one focuses on the day-to-day movement of the doctrine and the back-and-forth between the majority and the dissenters in any given case, the Justices' actual positions are, by historical standards, not that far apart. None of the Justices on the Rehnquist Court conceptualizes the judiciary as a full partner with Congress in the design and implementation of cohesive remedial schemes to ensure the protection of constitutionally mandated or democratically enacted rights. All see the modern judiciary as constrained in its remedial creativity by a dense statutory framework reflective of a fundamental transfer of remedial power from the courts to the legislatures. Each of the Justices appears committed to the notion that—all things being even remotely equal—it is more democratically sound and, therefore, normatively superior for legislatures to specify the available remedies for violations of rights and duties rather than to rely on the ad hoc equitable judgments of the judiciary. The contentious struggles over remedial issues that litter the Rehnquist Court's case reports are not battles over whether the Court should cut back on judicial discretion, equitable remedies, or litigation-positive interpretive strategies but instead disputes over how far such a trend should go.

c. Judicial Assertiveness in the Service of Limiting Judicial Power.—The final lesson that can be drawn from these cases is one of caution about terminology and perspective. In discussing these cases specifically and the Rehnquist Court more generally, it is easy to be drawn into a spirited debate about whether the Court's decisions manifest activism or passivity, supremacy or minimalism.¹¹⁴ These cases reveal the degree to which an honest and intellectually satisfactory resolution to that debate requires a nuanced answer and a willingness to embrace paradox. Here, as elsewhere, the driving Justices on the Court are pursuing a limited vision of judicial power but harnessing that vision to a starkly assertive judicial style.¹¹⁵

Though in substance and consequence these remedial cases serve to limit the availability of litigation and the power of the courts, they achieve those ends through means that are the antithesis of minimalism. To begin with, in each of the four cases, the Court went out of its way to grant certiorari, when a more prudent or less agenda-driven Court might have declined review.¹¹⁶ Having granted the cases, the Court then declined to

114. Compare, e.g., Kramer, *supra* note 1, at 130 (arguing that the Rehnquist Court displays a disturbing commitment to judicial "supremacy") with Meltzer, *supra* note 62 (arguing that many of the Rehnquist Court's decisions manifest a striking judicial "passivity") and CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT xi (1999) (arguing that the Rehnquist Court is properly committed to judicial "minimalism").

115. For a broadly similar argument in the context of criminal procedure, see Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEXAS L. REV. 1057 (2002).

116. *Sandoval*, for example, involved an issue over which the courts of appeal had issued three decades of broadly consistent opinions, in large part in response to the Court's own signals. See

apply the most relevant precedents dispassionately, instead openly invoking the power to restate and recalibrate the law in areas where prior decisions are confusing, contradictory, or overbroad.¹¹⁷ Finally, in resolving the cases, the Court fully embraced the broader jurisprudential implications of each of them, using them as vehicles for articulating broad standards for resolving the particular kinds of remedial questions at issue, rather than simply resolving the dispute at hand.¹¹⁸

B. Official Immunity and Fee-Shifting Statutes: Judicially Crafted Obstacles to Democratically Adopted Remedies

The right of action cases discussed above directly curtail litigation, either by closing off the courtroom altogether or by foreclosing lucrative or otherwise promising litigation strategies. Moreover, as discussed above, their substance and tone strongly suggest that they are motivated, at least in part, by an inchoate skepticism about the propriety and efficacy of litigation. However, those decisions taken alone do not lead inexorably to the conclusion that the Court's jurisprudence is primarily driven by an overarching orientation against litigation. To the contrary, those decisions admit of a number of other possible explanatory tropes—several of which are also present on the face of the Court's opinions. In particular, the Court goes to great pains to suggest that its decisions limiting the remedies available to civil litigants are driven by a general commitment to democracy and a more specific responsibility to ensure that coercive sanctions are imposed only after careful communal deliberation.¹¹⁹

That alternative explanation for the Court's remedial cases—however tenable it may be with regard to implied private right of action and *Bivens* cases—offers a strained interpretation of decisions such as *Great-Western* and *Gonzaga*, which involve the interpretation and implementation of congressionally adopted remedial schemes rather than the judicial

Sandoval, 532 U.S. at 295 n.1 (Stevens, J., dissenting) (listing cases). *Malesko* involved a fairly straightforward application of one of the Court's precedents, albeit to a more complicated and interesting factual scenario. The question specifically presented by *Gonzaga* was a fairly narrow issue of statutory construction the Court had on prior occasions declined to answer. See, e.g., *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426, 430–31 (2002). Even *Great-West*—which raised an issue of substantial financial importance that divided the courts of appeal—was a poor candidate for certiorari, given its peculiar procedural posture. See *Great-West Life Ins. & Annuity Co. v. Knudson*, 534 U.S. 61, 208–09 (2002) (explaining briefly the procedural posture of the case, in particular the fact that respondents were granted summary judgment by the district court on an alternative ground, making it likely that the Court's decision would not substantially affect the resolution of the parties' dispute).

117. See *supra* notes 97–99 and accompanying text.

118. See *supra* note 100 and accompanying text.

119. See *supra* notes 108–110 and accompanying text. See also, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280–81 (2002) (describing the need for Congress to speak clearly of its intention to create a private remedy); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 204, 67–69 (2001) (discussing a series of Court decisions limiting the remedies available to civil litigants in terms of separation of powers).

implication of remedies. Moreover, whatever plausibility such an explanation retains when the above cases are interrogated in isolation dissolves when they are put into dialogue with other related areas of the Court's recent jurisprudence, particularly the Court's decisions expanding the scope of public officials' immunity from damage actions brought pursuant to § 1983 and contracting the universe of § 1983 cases in which successful litigants are able to recoup their attorney's fees.

As will be developed below, the Rehnquist Court's qualified immunity and attorney's fees cases suggest that the very same Justices who express unease at implying or imposing judicially constructed remedies are perfectly sanguine about implying or imposing judicially constructed limitations on democratically enacted remedies. The linchpin running through these seemingly incongruous decisions is neither deference to the democratic branches of government nor aggressive judicial lawmaking; it is a subtle distaste for the institution of Litigation and a concomitant desire to curtail its operation.

1. *Qualified Immunity and Related Doctrines.*—Among the significant modern doctrinal impediments to litigation, the development of “qualified immunity” for governmental officials accused of violating the civil rights of private citizens almost certainly deserves pride of place. The doctrine provides immunity from liability—and where possible legal process¹²⁰—to any public official who violates the constitutional or statutory rights of a citizen if the underlying constitutional or statutory violation was not “clearly established” at the time of the relevant conduct.¹²¹ This exception to liability draws heavily on traditional common law sources but was reworked to serve modern policy concerns in the landmark 1982 case *Harlow v. Fitzgerald*.¹²²

120. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985) (holding that the qualified immunity doctrine “recognize[s] an entitlement not to stand trial or face the other hurdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law” and noting that “[t]he entitlement is an immunity from suit rather than a mere defense to liability”); see also *infra* note 127 and accompanying text (discussing reasons for this approach).

121. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (articulating the modern doctrine of qualified immunity); cf. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (stating that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law”).

122. 457 U.S. 800. The Court first utilized the phrase “qualified immunity” in referring to the protection governmental officials retain from certain suits under 42 U.S.C. § 1983 in *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974), but in that case the Court continued to follow the traditional rule tying immunity to the subjective good faith of the officer and, in any event, declined to define the terms of the available immunity. Over the next eight years, the Court offered some decisions that tried to explain the content of the “qualified immunity” available in § 1983 and *Bivens* cases—see, for example, *Wood v. Strickland*, 420 U.S. 308 (1975)—but did not arrive at the current (objective) standard until *Harlow*, 457 U.S. at 817–19.

The observation that *Harlow* involved the conscious, policy-driven adaptation of a longstanding common law rule—and the corollary that the conservative jurists who drove that change were opening themselves up to charges of hypocrisy if they voiced theoretical, rather than policy-driven, objections to similar efforts on behalf of more liberal policy aims—has been voiced in a variety of

In the quarter-century since that decision, a period roughly coterminous with the tenure of the Rehnquist Court, the Supreme Court (with the aggressive assistance of the courts of appeal) has developed a complicated common law jurisprudence of official immunity.¹²³

While qualified immunity and other related immunity doctrines¹²⁴ have been rapidly normalized and integrated into our understanding of the underlying remedial statutes, both the existence of these doctrines and their contours are not inevitabilities, but instead the product of the particular juridical culture that has held sway over the last quarter-century. While that culture is, of course, made up of many influences and vectors, here, as elsewhere, a visceral skepticism about the wisdom and propriety of litigation appears to be central to the Court's decisionmaking.

As Vicki Jackson and Richard Fallon, among others, have argued, the development of a doctrine of qualified immunity is in and of itself hostile to

contexts. See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 177–78 (1990) (Marshall, J., dissenting) (citing *Harlow*, in a death penalty case, for the proposition that “[t]he Court certainly has the authority to expand or contract a common-law doctrine where necessary to serve an important judicial or societal interest”).

123. Central to this new jurisprudence are progressively more stringent standards for determining that a right was clearly established and progressively greater tolerance for errors of judgment. A number of cases were important signposts on the road to that tougher standard. See, e.g., *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (summarily reversing a denial of summary judgment in an excessive force case involving the shooting of an unarmed fleeing suspect because the right not to be shot under the circumstances was not clearly established in a sufficiently “particularized” way and because “[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted”); *Saucier v. Katz*, 533 U.S. 194 (2001) (holding that police officers who use an “objectively unreasonable” amount of force may still be entitled to qualified immunity in § 1983 actions alleging excessive force if they “reasonably” but mistakenly believed that the amount of force used was “objectively reasonable”); *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (applying the rule that the “qualified immunity standard ‘gives ample room for mistaken judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate the law’” to summarily reverse factbound denial of immunity) (citations omitted); *Anderson v. Creighton*, 483 U.S. 635, 638–40 (1987) (holding that the relevant “legal rule” must be “clearly established” in a specific and “particularized” way).

124. Qualified immunity can be claimed only by real people, not by governmental entities. See *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (holding that “municipalities have no immunity from damages liability flowing from their constitutional violations”). Municipalities (though not states) can be sued for damages under § 1983. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that “local governing bodies” can be sued under § 1983 for “inonetary, declaratory, or injunctive relief”). Therefore, qualified immunity would only be of limited effectiveness in dissuading litigation if municipalities were broadly liable under the statute. However, the Court has been careful to impose substantial limitations on governmental liability under § 1983, limitations that work in tandem with qualified immunity to immunize much illegal or unconstitutional conduct from suits for damages. See, e.g., *Bd. of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (holding that municipal liability cannot be established by demonstrating that a constitutional violation was attributable to the conduct of a policymaker acting on behalf of a municipality absent some showing that the municipality itself was a “moving force” behind the illegal conduct); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (concluding that punitive damages are not available in § 1983 actions against municipalities); *Monell*, 436 U.S. at 694 (holding that municipal liability only attaches when tortious conduct was the result of an official governmental policy or practice).

litigation in a direct and unvarnished way, in that it (particularly in conjunction with other doctrines of official immunity) forecloses liability in a whole host of situations where an individual has suffered a violation of a substantial right and sought relief through a remedial mechanism that on its face promises recovery.¹²⁵ The details of the modern immunity doctrines only reinforce their anti-litigation pedigree. For example, the Court has created a streamlined summary judgment process for lawsuits against public officials, allowing for near-automatic interlocutory appeals when a motion for summary judgment on qualified immunity grounds is denied and arguably imposing higher substantive standards to survive summary judgment in such cases than in other litigation.¹²⁶ In so doing, the Court has been explicit in its rationale, explaining that qualified immunity is meant to impart protection from the burden of defending against litigation as well as protection from liability.¹²⁷ Similarly, despite the technical classification of qualified immunity as a defense, the burden to prove that a right was clearly

125. See, e.g., Fallon, *supra* note 1, at 482–84; Jackson, *supra* note 43, at 707. The notion that the Court's modern decisions restricting the scope of official liability are "activist" in a more general sense has long been a staple of left-wing criticism of the decisions. See, e.g., David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989).

126. See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) ("Immunity ordinarily should be decided by the court long before trial."); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding a district court's denial of qualified immunity immediately appealable "to the extent that it turns on an issue of law"); *Harlow*, 457 U.S. at 819 n.35 ("reiterat[ing] [an earlier] admonition" that "insubstantial" suits against governmental officials "undermine the effectiveness of government" and calling for the "firm application of the Federal Rules of Civil Procedure" to defeat such claims at the summary judgment stage).

127. See, e.g., *Saucier*, 533 U.S. at 200–01 ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.' The privilege is 'an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" (citation omitted) (quoting *Mitchell*, 472 U.S. at 526)); *Mitchell*, 472 U.S. at 526–27 (holding that qualified immunity doctrine "recognize[s] an entitlement not to stand trial or face the other burdens of litigation"); *Davis v. Scherer*, 468 U.S. 183, 195 (1984) ("The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated."); see also *Behrens v. Pelletier*, 516 U.S. 299, 308–09 (1996) (holding that defendants are entitled to immediate appeal of both a motion to dismiss and a motion for summary judgment in qualified immunity cases because the first serves defendants' interest in immunity from discovery while the second serves their interest in immunity from trial process).

This explanation of the role of qualified immunity is a break from the explanation offered during the early days of the doctrine, in which qualified immunity was portrayed as a shield from ultimate liability rather than a protection from trial process. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 419 & n.13 (1976) ("The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.").

established at the time it was violated rests on the party seeking relief.¹²⁸ Finally, the central innovation of the qualified immunity approach to official immunity is its shift from subjective assessment of the actor's "good faith" to an objective assessment of the firmness of the underlying legal rules.¹²⁹ As a matter of theory, this change reflects a determination that litigation is an inappropriate mechanism for policing official conduct on the constitutional margins; as a matter of policy, it makes it substantially easier to establish immunity by mooted a previously insuperable problem of proof.¹³⁰

The complicated immunity doctrines that have emerged over the last quarter-century serve as common law caveats to statutory exclamations.¹³¹ That the Court is willing to utilize policy arguments and general speculation about the purpose of congressional enactments to interpose unwritten limitations on civil rights plaintiffs is particularly striking given its increasing unwillingness to credit parallel arguments in favor of implying remedies

128. See, e.g., *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) ("Qualified immunity is a defense that must be pleaded by a defendant official."). While the burden of proof is ultimately on the plaintiff to establish that the official defendant violated a clearly established legal rule, the initial burden of pleading qualified immunity appears to be on the defendant. See *id.*; *Harlow*, 457 U.S. at 815 & n.24 (so stating, albeit fairly early in the development of the doctrine); cf. *Gomez v. Toledo*, 446 U.S. 635, 640–41 (1980) (holding that the burden is on the defendant to plead that she acted in "good faith" and is, therefore, entitled to "qualified immunity" under the pre-*Harlow* immunity standard). But see *Leatherman v. Tarrant County Narcotics, Intelligence, & Coordination Unit*, 507 U.S. 163, 166–67 (1993) (reserving the question of whether qualified immunity jurisprudence imposes a "heightened pleading standard" on those suing public officials for monetary damages under civil rights statutes).

129. See *Harlow*, 457 U.S. at 815–19 (executing and justifying the change).

130. The Court offered such justifications explicitly in *Harlow*. See *id.* at 815–16 ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition in [an earlier case] that insubstantial claims should not proceed to trial."); *id.* at 816 ("[A]n official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury."); *id.* at 816–17 ("[I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to 'subjective' inquiries of this kind. . . . Inquiries of this kind can be peculiarly disruptive of effective government."). Later cases have only been more direct. See, e.g., *Behrens*, 516 U.S. at 306 ("*Harlow* adopted this criterion of 'objective legal reasonableness,' rather than good faith, precisely in order to 'permit the defeat of insubstantial claims without resort to trial.'").

131. The Court has, on a number of occasions expressly acknowledged that the immunity doctrines are judge-extrapolated exceptions to categorical statutory text. See, e.g., *Wyatt v. Cole*, 504 U.S. 158, 163–64 (1992) ("Section 1983 'creates a species of tort liability that on its face admits of no immunities.' Nonetheless, we have accorded certain government officials either absolute or qualified immunity from suit . . ." (quoting *Imbler*, 424 U.S. at 417)). To be clear, qualified immunity only so operates in actions brought against state and local officials pursuant to § 1983. In actions against federal officials, qualified immunity serves as a common law exception to a common law remedy. For that reason some commentators have suggested that *Harlow* itself was rightly decided but that the Court erred in extending qualified immunity to § 1983 actions. See, e.g., Garry S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of Harlow v. Fitzgerald to Section 1983 Actions*, 38 EMORY L.J. 369 (1989).

from silent statutes.¹³² When one puts the implied right of action and qualified immunity cases next to each other, it often appears that the Court's operative methodology for interpreting remedial statutes is neither strict nor broad, but instead simply litigation-hostile. The point here is not that the Court has been wrong to develop fairly strong immunity doctrines in civil rights cases, but merely that in so doing it has demonstrated a substantive resistance to litigation that transcends textualist and democratic concerns.

Once again, it is worth noting that the caselaw in this area suggests that hostility to litigation is a phenomenon that implicated the entire Rehnquist Court, though affecting each Justice in a different way and to a different degree. Despite the absence of any text or direct legislative history supporting judicial extrapolation of substantial immunities from suit under § 1983,¹³³ all nine Justices are comfortable with at least a fairly broad qualified immunity doctrine, and all nine have joined opinions expressly praising the doctrine for forestalling litigation.¹³⁴ When the Justices engage each other on the scope of qualified immunity, they do not dispute its central role or justification but instead bicker about peripheral concerns such as whether officials are allowed one or two interlocutory appeals of pretrial denials of qualified immunity,¹³⁵ whether the logic of qualified immunity requires a heightened pleading standard in order to facilitate summary judgment when

132. For two reasons, the long historical pedigree of official immunity does not explain the difference. First, the modern doctrine of qualified immunity expressly deviates from traditional dictates in a number of ways, including its abandonment of a requirement of subjective good faith. See *Harlow*, 457 U.S. at 815–19. As Justice Stevens demonstrated in his dissent in a 1978 case, even the precursor qualified immunity decisions of the 1970s gave up the pretense of simply applying common law immunities when they abandoned inquiry into the particular immunities traditionally accorded to each governmental office for a generalized vision of qualified official immunity. See *Procunier v. Navarette*, 434 U.S. 555, 568 (1978) (Stevens, J., dissenting). Second, the argument that current immunity doctrines track traditional common law rules and, thus, must have been intended by legislators, see, e.g., *Wyatt*, 504 U.S. at 163–64,—even if true—mirrors a structurally identical argument about implied private rights of action that has been offered by the dissenters but rejected by the majority in a number of Rehnquist era cases. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 287–88 (2001) (rejecting an argument based on the “expectations” of the “enacting Congress”).

133. I say that there is no “direct legislative history” in support of qualified immunity (or other modern immunity doctrines) specifically to acknowledge that the Court has at times defended these immunity doctrines on grounds of congressional intent. In particular, the Court has argued that, in some instances, a “tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that ‘Congress would have specifically so provided had it wished to abolish the doctrine.’” *Owen v. City of Independence*, 445 U.S. 622, 637 (1980) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)).

134. See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 590–91 (1998) (opinion by Justice Stevens joined, *inter alia*, by Justice Breyer); *Behrens*, 516 U.S. at 306 (opinion joined by seven of the nine Justices of the second Rehnquist Court, all except Justices Stevens and Breyer); *Harlow*, 457 U.S. at 816–17 (opinion joined, *inter alia*, by Justice Stevens).

135. See *Behrens*, 516 U.S. at 301 (deciding the question of “whether a defendant’s immediate appeal of an unfavorable qualified-immunity ruling on his motion to dismiss deprives the court of appeals of jurisdiction over a second appeal, also based on qualified immunity, immediately following denial of summary judgment”).

the substance of the right asserted requires a showing of bad faith,¹³⁶ and whether qualified immunity extends to employees of private entities performing governmental functions on a contractual basis.¹³⁷ To the extent that there is a dispute among the Justices as to the breadth of the underlying doctrine, their disagreement appears to focus on whether qualified immunity provides a general immunity for all governmental “mistakes of judgment” or whether certain lapses of judgment are sufficiently inexcusable to permit litigation and liability.¹³⁸

One intriguing aspect of the doctrinal history of qualified immunity is the complicated role played by the Court in both fanning the anti-litigation flames and then imposing limits on the doctrine developed by the most aggressive circuit courts. Though the modern Court gave birth to qualified immunity, provided its rationale, and nourished it until it had become an essential part of federal civil rights law, it has not always been willing to push the doctrine quite as far as some of the circuit courts. In a handful of interesting cases, the Court has reversed lower court decisions offering particularly broad interpretations of the reach or effects of qualified immunity.¹³⁹ That the Court has imposed some limits on its own anti-litigation initiative no more disproves the Court’s hostility to litigation than recent decisions declining to push the frontier of the Court’s federalism or takings jurisprudence¹⁴⁰ disprove the Court’s commitment to federalism or property rights. Nonetheless, the fact that the Court has on occasion had to serve as a backstop against excessive lower court infatuation with qualified immunity does remind us that the Court’s hostility to litigation co-exists with a variety of other impulses and ideas, some of which are inherently cross-cutting and most of which occasionally must be balanced against the Court’s anti-litigation zeal.¹⁴¹

136. *Crawford-El*, 523 U.S. 574.

137. *Richardson v. McKnight*, 521 U.S. 399 (1997).

138. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam) (disagreeing over whether shooting of suspect was excusable as a matter of law or required jury consideration); *Groh v. Ramirez*, 540 U.S. 551 (2004) (disagreeing over whether mistake in judgment that resulted in insufficiently particularized search warrant was excusable as a matter of law); *Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam) (disagreeing over whether the Secret Service’s arrest of an individual mistakenly thought to be a threat to the President’s life was excusable as a matter of law).

139. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (holding that the circuit court erred in applying a “rigid gloss” to the qualified immunity standard that denied relief to tort plaintiffs if there was no prior case with “materially similar” facts where a constitutional violation had been established); *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (unanimously holding, contrary to the position of a number of circuits, that an order denying summary judgment in a qualified immunity case because of uncertainty about the factual sufficiency of the allegations was not immediately appealable).

140. *See supra* note 52 (citing some such cases).

141. While I speak here primarily of the balancing of semi-rational impulses and influences—a process that occurs largely off stage—it is worth noting that the Court has, on numerous occasions, expressly identified qualified immunity doctrine as the result of the careful and explicit balancing of competing policy interests. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (“Qualified

2. *Attorney's Fees in Civil Rights Actions.*—Under the traditional “American Rule,” the winning party in a civil lawsuit remains responsible for his or her own attorney’s fees.¹⁴² However, Congress (and state legislatures) remain free to adopt a different rule for particular causes of action and they have not been shy to do so.¹⁴³ Beginning in the mid-1960s, Congress gradually adopted a general policy of allowing for attorney’s fees in most major civil rights actions, including actions under several titles of the Civil Rights Act of 1964.¹⁴⁴ This policy was confirmed and rationalized in the Civil Rights Attorney’s Fees Act of 1976, which authorized courts to award fees to “prevailing parties” in actions to enforce the major Reconstruction Era civil rights statutes, in particular 42 U.S.C. § 1983.¹⁴⁵ In the years since 1976, whenever Congress has adopted substantial new civil rights legislation, it has made sure to authorize the availability of attorney’s fees.¹⁴⁶ Congress’s purposeful abandonment of the traditional American Rule in civil rights cases was motivated by a general desire “to encourage litigation protecting civil rights” as well as a more specific intent “to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.”¹⁴⁷ By compelling losing parties to subsidize the attorneys of those whose civil rights they violate, Congress endorsed civil rights litigation as an essential mechanism of individual dispute resolution and as a legitimate weapon “securely within the federal law enforcement arsenal.”¹⁴⁸

Over the last two decades, the Rehnquist Court has handed down a series of decisions that have chipped away at the availability of attorney’s fees for civil rights plaintiffs. In particular, the Court has fashioned a definition of “prevailing party” that defines out of that category a wide variety of plaintiffs with meritorious civil rights claims. In two late-1980s cases arising out of prisoners’ lawsuits, the Court in rapid succession held that a determination by the federal courts that a petitioner’s rights have been violated without an entry of a formal declaratory judgment or injunction does

immunity strikes a balance between compensating those who have been injured by official conduct and protecting government’s ability to perform its traditional functions.”).

142. *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994); *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975).

143. For a long list of federal statutes that allow for the award of attorney’s fees, albeit one that is twenty years out of date and was never intended to be complete in the first place, see *Marek v. Chesny*, 473 U.S. 1, 43–51 (1985).

144. The Civil Rights Act of 1964 included provisions for fee awards to enforce its Title II (public accommodations) and Title VII (employment) provisions. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598, 622, 635–38 (2001) (Ginsburg, J., dissenting) (narrating the relevant history).

145. 42 U.S.C. § 1988 (2000).

146. See, e.g., *Buckhannon*, 532 U.S. at 601 (noting that the complaint at issue in that case involved claims under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3631, and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, both of which contained specific fee-shifting provision modeled on other civil rights statutes).

147. *Kay v. Ehrler*, 499 U.S. 432, 436 (1991).

148. *Buckhannon*, 532 U.S. at 634 (Ginsburg, J., dissenting).

not render him a prevailing party,¹⁴⁹ and that a declaratory judgment to the same effect is itself insufficient if it is entered at a point in time where it does not provide any substantive benefit to the litigant.¹⁵⁰ A few years later, the Court determined that an award of nominal damages does in fact render a plaintiff eligible for attorney's fees under the fee-shifting statutes, but nonetheless reversed an award of fees to a victorious litigant on the grounds that attorney's fees are usually inappropriate when a victorious civil rights plaintiff asks for substantial damages but receives only nominal ones.¹⁵¹ Finally, in a hotly contested 2001 case, the Court held—in conflict with the prevailing rule in the vast majority of the circuits—that a party whose civil rights lawsuit compels a defendant to abandon an illegal or unconstitutional practice or rule (and who thereby receives all the relief she sought) is not a “prevailing party” within the meaning of the statute unless the change is memorialized and made binding by a judicial decree.¹⁵²

These decisions, like those in the qualified immunity context, demonstrate both literal and theoretical hostility to litigation. On the pragmatic side, these decisions make it more difficult for attorneys to undertake civil rights litigation, in that they both directly curtail the number of situations in which the attorney will be able to obtain her fees and portend an inhospitable welcome if the case should generate a novel question about the availability of fees. In particular, by limiting the availability of fees to situations in which the plaintiff obtains a judicially enforceable judgment or decree that provides significant betterment of his condition (through substantial damages or a consequential injunction), the decisions require an attorney considering a civil rights lawsuit to evaluate not only the underlying merits of the plaintiff's claim but also such extraneous variables as the likelihood that the action will become moot, the possibility that relief will come through non-judicial channels, and the scope of any potential damage award.¹⁵³

149. *Hewitt v. Helms*, 482 U.S. 755, 759–60 (1987).

150. *Rhodes v. Stewart*, 488 U.S. 1, 3–4 (1988) (per curiam).

151. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

152. *Buckhannon*, 532 U.S. at 605 (rejecting the “catalyst theory”). Nine of ten circuit courts who considered the question in the 1990s had adopted the catalyst theory. *See id.* at 602 n.3; *see also id.* at 622, 626–27 & n.4 (arguing that, prior to a 1994 Fourth Circuit decision, every single regional circuit had adopted the rule).

153. It should be noted that, while I am generally critical of the Rehnquist Court's hostility to litigation, I do not mean to suggest that there is a one-to-one correlation between decisions that reduce the volume of litigation and decisions that are normatively undesirable. To the contrary, the rapid dismissal of truly meritless claims and the development of alternative mechanisms for resolving certain types of disputes that do not lend themselves to litigation are worthy goals, no matter how “hostile to litigation” they may be. While I need not take a position on the ultimate wisdom of the rules announced in these attorney's fees cases, there are certainly strong arguments to be made for the proposition that lawyers ought to be encouraged to take into account the likelihood of a case being moot or the potential scope of damages before determining whether to bring any action, even a civil rights action. *But see supra* text accompanying notes 146–151 (explaining that

By adopting a definition of prevailing party that is so directly tied to the substantive relief obtained by the plaintiff via judicial decree, the Court also demonstrates a more general and more theoretical discomfort with an expansive understanding of litigation's nature, purpose, and domain. These decisions reflect an understanding of litigation that, however grudgingly, accepts the utility of court process and professional assistance in obtaining substantive relief but assumes the illegitimacy of private litigation as a tool for regaining dignity, vindicating abstract rights, or ensuring compliance with public norms. These decisions are, to some extent, of a piece with the early Rehnquist Court's decisions manifesting hostility to structural reform litigation,¹⁵⁴ but they go beyond those decisions in objecting to nontraditional litigation even when such litigation poses no threat of over-reaching or anti-democratic judicial remedies, involves private defendants, and raises classic Hohfeldian claims.¹⁵⁵

In the attorney's fees cases, the Court's analysis bears a somewhat ambiguous relationship to the majoritarian critique that sometimes decorates its litigation-hostile decisions.¹⁵⁶ On the one hand, unlike in the qualified immunity context,¹⁵⁷ the Court's decisions do cite to statutory text in imposing limitations on litigation.¹⁵⁸ Moreover, in so doing, the Court offers a forthright analysis of the relevant provision that is, at least superficially,

Congress provided for attorney's fees under the major civil rights statutes in order to allow worthy litigants to obtain both relief *and* full compliance with civil rights law).

154. See *supra* subpart II(A).

155. The term "Hohfeldian" derives from the legal taxonomy developed by Wesley Newcomb Hohfeld. That taxonomy defines the relationships between legal concepts—right, no-right, privilege, duty, power, liability, immunity, and disability—as either opposite or correlative. For example, if A has a right to possess a piece of property, B has no-right to it (an opposite) and a duty not to trespass (a correlative). A's liberty, therefore, depends on whether B's duty is enforced. See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (developing a taxonomy of jural opposites and correlatives to clarify formal legal thought); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (same). In the late 1960s and 1970s, some modern civil rights litigation—in particular structural reform litigation—was described (and at times derided) as "non-Hohfeldian" because it involved attempts to assert the rights of and obtain relief for third parties. See, e.g., Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968). See generally Morrison, *supra* note 62 (discussing the Rehnquist Court's attitude towards non-Hohfeldian plaintiffs). My point here is non-technical; I mean only to note that the Rehnquist Court's hostility to civil rights litigation extends to situations where a single individual asserts violations of a personal or property right against another individual and seeks directly proportionate recompense from that individual, a traditional use of the legal system considered legitimate by just about every commentator who has discussed the proper scope of litigation.

156. See *supra* notes 110–112 and accompanying text.

157. See *supra* notes 134–135 and accompanying text.

158. See, e.g., *Buckhannon*, 532 U.S. at 603–08 (discussing the meaning of the statutory term "prevailing party" with reference to both plain meaning of terms and legislative history and detailing similar efforts of the Supreme Court in all other significant cases setting limits on the availability of attorney's fees).

plausible.¹⁵⁹ On the other hand, the Court's over-arching approach to interpreting the fee statutes is in substantial tension with the policy choices Congress has made. Where Congress appears to have made a concerted effort to develop private civil rights litigation as an important mechanism for enforcing communal norms and making real our commitment to civic equality, the Court reads the statutes almost exclusively as a mechanism for ensuring access to the civil courts for litigants possessing particularly substantial claims for personalized relief. Where Congress has specifically delineated civil rights litigation as a different species of litigation in which recoupment of attorney's fees is the norm, the Court has continued to interpret civil rights fee-shifting statutes narrowly, relying on the general presumptive rule against fee shifting that Congress considered and largely rejected when designing the relevant statutory scheme. In interpreting statutes drafted to facilitate litigation through a filter of litigation skepticism, the Court is paying heed to Congress's notes while missing its tone.

C. Embracing Arbitration: Deprivileging the Courts

1. *The Rehnquist Court and the Federal Arbitration Act.*—In understanding the nature of the Rehnquist Court's hostility to litigation, the Court's decisions interpreting the scope of the Federal Arbitration Act (FAA)¹⁶⁰ are another important subject of inquiry. In over twenty decisions spread roughly evenly over the last two decades, the Rehnquist Court has given the FAA an increasingly prominent role in shaping the contours of American dispute resolution.¹⁶¹ Endorsing a formulation coined in an

159. See *id.*; see also *id.* at 610–16 (Scalia, J., concurring) (offering a more detailed argument in favor of a narrow reading of “prevailing party” focused on the term’s history). The thrust of the argument, as reflected in both the *Buckhannon* majority and concurrence, is that “prevailing party” is a term of art with a fixed and limited meaning. See *id.* at 603 (“In designating those parties eligible for an award of litigation costs, Congress employed the term ‘prevailing party,’ a legal term of art.”); *id.* at 610 (Scalia, J., concurring) (“‘Prevailing party’ is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes.”).

160. 9 U.S.C. §§ 1–16 (2000).

161. See, e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (holding that the FAA requires an arbitrator rather than a state court to determine in the first instance whether an arbitration agreement allows for class action arbitration); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (narrowly construing an FAA provision excluding from its pro-arbitration mandate “contracts of employment of . . . workers engaged in foreign or interstate commerce” (quoting 9 U.S.C. § 1 (2000))); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (holding, *inter alia*, that a litigant bears the burden of establishing that the high costs of arbitration would thwart her effort to vindicate statutory rights); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995) (holding that the FAA applies to all transactions within Congress’s Commerce Clause power); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (holding that, under the FAA, statutory anti-discrimination claims can be subjected to compulsory arbitration); *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 479–80 (1989) (holding that the FAA permits agreements requiring arbitration of federal securities law claims); cf. *Southland Corp. v. Keating*, 465 U.S. 1, 11–12 (1984) (holding, in a decision that slightly predates the Rehnquist era but was repeatedly reinforced during that period, that the FAA’s requirements regarding enforcement of arbitration agreements apply in state as well as federal courts).

opinion issued shortly before the Rehnquist era formally began,¹⁶² the Court has repeatedly asserted that the FAA states a “liberal federal policy favoring arbitration agreements” and has utilized that policy as a blunt tool to resolve nearly every issue of statutory construction regarding the statutory scheme.¹⁶³ In short order, the Court has determined that the FAA applies with full force to disputes between employers and employees,¹⁶⁴ treats form agreements between large entities and individual citizens as if they were fully bargained private contracts,¹⁶⁵ considers arbitration to be a sufficient forum for the vindication of most statutory rights (including central civil rights provisions),¹⁶⁶ mandates the arbitration of claims brought in state as well as federal court,¹⁶⁷ and preempts states from adopting rules that protect access to their courts.¹⁶⁸

The Court has been uncommonly frank about its reasons for favoring arbitration. In case after case, the Justices, at times unanimously, have indicated that the FAA was adopted with the specific purpose of abrogating the Anglo-American legal system’s traditional hostility to arbitration.¹⁶⁹ Seeing their purpose as uprooting a longstanding institutional bias against alternative dispute resolution mechanisms, the Justices have taken that role seriously—creating a blanket rule that resolves every close issue of construction in favor of arbitration.¹⁷⁰ In large measure, the Justices see the

162. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983).

163. See, e.g., *Randolph*, 531 U.S. at 91 (quoting the above principle); *Gilmer*, 500 U.S. at 25 (same); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (same).

164. See, e.g., *Circuit City*, 532 U.S. at 109 (addressing the scope of exclusion from the FAA of certain categories of employment contracts); *Gilmer*, 500 U.S. at 25 & n.2 (age discrimination claim between employer and employee).

165. See, e.g., *Randolph*, 531 U.S. at 82; *Gilmer*, 500 U.S. at 25 n.2 (form securities regulation application).

166. See, e.g., *Gilmer*, 500 U.S. at 26–27 (Age Discrimination in Employment Act); *Rodriguez de Quijas*, 490 U.S. at 486 (1989) (Securities Act of 1933); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Racketeer Influenced and Corrupt Organizations Act and the Securities Act of 1934).

167. The main precedent in this area is a decision from the immediate pre-Rehnquist Court era, *Southland Corp. v. Keating*, 465 U.S. 1, 11–12 (1984), which held that the FAA’s requirements regarding enforcement of arbitration agreements apply in state as well as federal court. The Rehnquist Court has consistently applied that decision, despite some substantial doctrinal misgivings. For a brief discussion of this issue, see *infra* note 176.

168. See, e.g., *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (the FAA preempts a Montana statute requiring that an arbitration clause be indicated on the first page of a contract in prominent font); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (the FAA preempts an Alabama statute imposing restrictions on availability of arbitration); *Perry*, 482 U.S. at 491 (1987) (the FAA preempts a California law guaranteeing access to courts in wage collection actions).

169. See *Circuit City*, 532 U.S. at 118; *Randolph*, 531 U.S. at 89; *Allied-Bruce*, 513 U.S. at 272; *Gilmer*, 500 U.S. at 24; *McMahon*, 482 U.S. at 225.

170. This rule of construction has been stated in various forms. See, e.g., *supra* text accompanying notes 162–163 (noting the Rehnquist Court’s frequent reference to the FAA’s “liberal policy favoring arbitration agreements”); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989) (stating that arbitration agreements must be

FAA not as a specific statute authorizing deviation from a traditional rule in a limited set of circumstances in order to achieve particular policy ends, but rather as a general effort to normalize arbitration as a method of dispute resolution. Central to that task is the conviction—shared, in the telling, by the statute’s drafters and the majority of the modern Court—that arbitration is, in most instances, a substantively adequate and procedurally preferable alternative to the mire and expense of litigation.¹⁷¹

At a minimum, the Court’s commitment to destigmatizing arbitration is functionally hostile to litigation, in that it works to shift disputes—often in large volume—from the institution of Litigation to alternative, culturally distinct forums. Moreover, as indicated above, it does so in large measure out of the conviction—openly voiced only on occasion but always present—that there is nothing intrinsically special or desirable about litigation as a method for resolving disputes. Litigation is sheered of its special status (ostensibly by Congress) and made to compete against other dispute resolution models for that heavy work, and to do so on a playing field that values efficiency and flexibility above all else.

Some have argued that the Court’s broad construction of the FAA also reflects hostility to litigation in a broader and more colloquial sense. According to this reading, what started out as an honest effort to enforce Congress’s intention to put arbitration on an even footing with litigation as potential mechanisms for resolving commercial disputes has morphed over the last two decades into a policy-driven assault on the wisdom and propriety of litigation as a mechanism for resolving such disputes.¹⁷² As Justice Stevens, probably the strongest proponent of this view on the current Court,

“generously construed as to issues of arbitrability” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

171. See, e.g., *Allied-Bruce*, 513 U.S. at 280 (talking about “arbitration’s advantages” including the fact that it can be “cheaper,” “faster,” and “simpler” than litigation); *Volt Info. Scis.*, 489 U.S. at 478 (referring to a Congressional policy to “encourage the expeditious resolution of disputes”); see also *supra* note 166 (listing some cases where the Court has found arbitration a sufficient forum for the vindication of important federal statutory rights); cf. *Randolph*, 531 U.S. at 79 (dismissing concerns about the procedural fairness of arbitration for less informed and poorer citizens).

172. This view has been voiced by both internal and external critics. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (arguing that the Supreme Court’s arbitration jurisprudence will allow “birds of prey” to “sup on workers, consumers, shippers, passengers, and franchisees”); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (“The Supreme Court has created a monster.”); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) (critiquing arbitration caselaw for increasingly favoring arbitral forums without regard for basic fairness or rule of law norms); *infra* note 173 and accompanying text (quoting Justice Stevens).

has argued, the Court's recent decisions "have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration" over litigation.¹⁷³

Whether the Rehnquist Court's cases offering an expansive interpretation of the FAA are aimed at deprivileging litigation or more broadly at destabilizing it, and concomitantly whether the driving force behind this interpretive thrust is the drafters of the statute or the current Justices, are difficult and important analytic questions, but, for our purposes, they are only disputes about the degree to which the decisions are hostile to litigation. The decisions boldly, repeatedly, and explicitly call for the courts to shepherd more and more cases out their own courthouse doors and into the hands of arbitrators, and do so in language suggesting that little, if anything, is lost by that shift.

As in the other areas surveyed above, the details of the cases tell us a great deal about the nature of the Rehnquist Court's hostility to litigation. For example, once again we can note that the Court's entire membership has participated in the development of a litigation-hostile doctrinal field (though, again, approaching the task with differing degrees of zeal).¹⁷⁴ Similarly, this area of the law gives us the first hint of an aspect of the Rehnquist Court's hostility to litigation that will be the subject of substantial comment later in this Article:¹⁷⁵ when hostility to litigation comes into conflict with federalism, this strongly pro-federalism court will nonetheless sacrifice that value in order to keep the courts inaccessible.¹⁷⁶ Finally, as in the areas of

173. *Circuit City*, 532 U.S. at 105, 131–32 (Stevens, J., dissenting).

174. A few recent cases raising basic concerns about the availability of justice have seen the four more liberal members of the Court dissent as a bloc. See, e.g., *Circuit City*, 532 U.S. at 124 (Stevens, J., dissenting); *Randolph*, 531 U.S. at 92 (Ginsburg, J., dissenting). In addition, in a few cases, some of the more conservative justices have dissented or otherwise voiced displeasure due to their overarching commitment to federalism. See *infra* note 176 (discussing the separate opinions in *Allied-Bruce*). However, some of the opinions cited in this Part have been joined by most of the Justices and all of the Justices have joined some of the opinions. The participation of the Court's left wing in the modern arbitration jurisprudence is underscored by the identity of the author of the choice phrases in the *Moses H. Cone* case: Justice Brennan.

175. See *infra* subpart IV(B) (tracing this theme).

176. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (holding that the FAA preempts state law protecting access to courts in wage collection actions); *Southland Corp. v. Keating*, 465 U.S. 1, 11–12 (1984) (holding that the FAA's requirements regarding enforcement of arbitration agreements apply in state as well as federal court). While the Court, with at least the occasional vote of every Justice but Justice Thomas has applied the FAA in state court and has read the statute as having broad preemptive effect, most of the strong advocates of federalism have questioned those decisions and have, on occasion, called for their overruling. See, e.g., *Allied-Bruce*, 515 U.S. at 282 (O'Connor, J., concurring) (noting her dissent from *Southland* and stating that she still believes it wrongly decided, but arguing that the decision is now sufficiently entrenched that only Congress can overrule it); *id.* at 284 (Scalia, J., dissenting) (calling for overruling *Southland* but determining to enforce it until there are sufficient votes to overrule it); *id.* at 285 (Thomas, J., dissenting) (calling for the overruling of *Southland*); *Southland*, 465 U.S. at 21 (O'Connor, J., joined by Rehnquist, C.J., dissenting from initial decision). It is unclear whether there ever existed a majority on the Rehnquist Court for abandoning *Southland*. If there did, the fact that the Court never got around to it reflects that restoring a federalist balance on this issue was not a particular priority. If there did

implied private rights of action and official immunity,¹⁷⁷ the Justices on all sides of each decision aggressively claim the support of history for their approach and work assiduously to craft historical narratives that validate their own approach and mark any contrary position as not only wrong, but also fundamentally illegitimate.¹⁷⁸ Particularly noticeable in this area, the tendency to claim that decisions hostile to litigation (or dissents from such decisions) are the necessary consequence of an independently unfurling historical course seems driven by a desire—perhaps unconscious—to mask the degree to which these crucially important decisions about the nature of our courts are being made by the current Justices.

2. *An Intriguing Episode of Indecision.*—The degree to which the current Court's hostility to litigation is under-theorized is made manifest by the Court's confused reaction to the legal issues posed by one 2003 case, *Green Tree Financial Corp. v. Bazzle*.¹⁷⁹ *Bazzle* presented the Court with its first opportunity to confront a development in arbitration practice that threatens to perplex the Justices in coming years: the push by plaintiffs' lawyers (and some state judges) to build class certification and other aspects of contemporary mass litigation practice into compelled arbitrations.¹⁸⁰ That

not, that fact may have had a lot to do with the degree to which some of the more conservative Justices came to appreciate the anti-litigation (and pro-business) consequences of the rule.

177. See *supra* subparts III(A)–(B).

178. Compare, for example, the two diametrically different accounts of the statute's history provided by the majority and dissenting opinions in *Circuit City*, 532 U.S. at 105 (majority) and *id.* at 124 (Stevens, J., dissenting). See also *Southland*, 465 U.S. at 21 (O'Connor, J., dissenting) (contending that the majority's conclusion was wrong as a matter of statutory construction and that "[o]ne rarely finds a legislative history as unambiguous as the FAA's").

179. 539 U.S. 444 (2003). *Bazzle* involved two actions in which different groups of homeowners sought damages from the same lending company based on alleged violations of a state consumer protection statute. The company sought to compel arbitration pursuant to a standard contract that the homeowners had signed, and the homeowners countered by requesting that the arbitration, if ordered, be conducted as a class action proceeding. In a series of procedurally complicated rulings, the courts ultimately compelled arbitration and the courts and the arbitrator determined that the arbitrations would proceed as class actions. After substantial judgments were entered in both cases and confirmed by the state courts, the lender sought relief from the United States Supreme Court, arguing that the decision to proceed as a class action was contrary to the terms of the relevant arbitration agreement and, thus, violated the FAA. *Id.* at 447–50.

180. For a general discussion of the emergence of class action arbitration, see Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000). For academic discussion of *Bazzle*, see Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle*, 41 CAL. W. L. REV. 1 (2004), and *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 410–20 (2003) [hereinafter *Harvard Note*]. It should be noted that, while these articles—and the larger academic literature on the Supreme Court's current arbitration jurisprudence—frame the relevant issues in doctrinal rather than cultural terms, they express similar interest and confusion about whether the Supreme Court's arbitration jurisprudence will ultimately produce a relatively equitable dispute resolution culture or will instead effectively close off meaningful review for many employees and consumers. For another work speculating fairly overtly on these issues in the employment law context, see Dennis R. Nolan, *Employment Arbitration After Circuit City*, 41 BRANDEIS L.J. 853 (2003).

practice and others like it,¹⁸¹ which individually and collectively have the effect of making arbitration look a lot more like litigation, serve as something of a diagnostic test for the Justices' hostility to litigation, requiring the Justices to ask what it is precisely about litigation that triggers their disfavor.

If, the Justices' antipathy towards the institution of Litigation stems largely from distrust of or disappointment with the courts or the judges who staff them, then the Justices ought have little stake in the procedures that are adopted in alternative dispute resolution forums. Having succeeded in depriving the formal courts and ensuring that parties who wish to do so can guarantee themselves an arbitral forum (and veto power over the legal and factual decisionmaker), the Court's work is largely done. If some lawyers, judges, or advocates want to use creative mass settlement procedures to solve some of the equity and access questions that arise out of compelled arbitration, that is no business of the Court; it is instead a policy matter to be worked out through the normal interplay of state statutes, common law rules, and privately drafted agreements.

If, on the other hand, the impulse nourishing the Court's hostility to litigation and contributing to its arbitration jurisprudence reflects not only a distrust of the courts but also a deeper set of concerns about the cost of litigation, the explosion of liability for trivial offenses, and the manipulation of class action procedures, then it is imperative for the Court to police the actions of state courts and arbitrators to ensure that they do not turn arbitrations into a species of expensive, meddlesome private litigation. On this reading, it is not our over-reliance on courts or the anti-democratic nature of court-driven remediation efforts that trouble the Justices, but instead the very culture of modern civil litigation. Transplanting that culture into another forum does nothing to alleviate the problem; it simply poisons that forum.

In *Bazzele*, this deep theoretical question was complicated by a less weighty but equally cross-cutting question: who gets to decide whether contracts allow for class action arbitration. This question similarly highlights strains in the Court's underlying anti-litigation impulse, at least as mobilized in the arbitration context. On the one hand, a decision granting that authority unequivocally to arbitrators would demonstrate further respect for their abilities and for the integrity of alternative dispute resolution forums; as such

Though the Court's reaction to arbitrations that share essential characteristics of litigation is certain to come up in future litigation, it is possible that the specific issue addressed in *Bazzele* (the propriety of class arbitration when the relevant contract is silent on the matter) may not arise again, as proactive businesses have been routinely including express prohibitions on class action arbitration in their agreements. For a general discussion of that movement and speculation that the propriety of those clauses will eventually make their way to the high court, see *Harvard Note*, *supra*, at 410–11, 415–20.

181. Cf. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (involving a dispute about the propriety of awarding punitive damages in a securities arbitration).

it would be a step towards institutional parity between courts and alternative forums. On the other hand, if the Court conceptualizes the FAA as manifesting a desire to protect businesses who so contract from the substance of modern civil litigation—the costs, the inconveniences, the general mire—then it is important to locate the power to make that determination with the entity best poised to make that determination at the onset of the proceeding and to do so in a manner subject to appellate review.¹⁸²

The decision in *Bazzle* did little to reveal the Court's resolution of these issues, but it did highlight the degree to which they befuddle the Justices. Though none of the Justices directly addressed the wisdom or propriety of infusing class action mechanisms into private arbitration, the Chief Justice's dissenting opinion (joined by Justices O'Connor and Kennedy) strongly suggested that its signers disfavored such a hybrid institution and would prefer legal rules that limit its development,¹⁸³ while Justice Stevens's opinion hinted that he saw no problem with such a development.¹⁸⁴ The remaining five Justices found doctrinal reasons to avoid commenting—even obliquely—on this broader issue, as the plurality opinion spoke only to the second procedural issue¹⁸⁵ and Justice Thomas declined to reach either question on federalism grounds.¹⁸⁶ These fractured opinions left the Court literally paralyzed with indecision and would have put the Court in the very rare position of being unable to issue a judgment if Justice Stevens had not taken the even rarer step of expressly casting his vote against his favored disposition in order to produce a judgment.¹⁸⁷

182. Moreover, in the case at issue, Justices who might take this more substantive anti-litigation tack were confronted with a completed dispute resolution process that had utilized class action procedures and produced enormous judgments for relatively technical statutory violations. In considering whether to locate the power within the judiciary, they had the tempting opportunity to immediately invalidate a proceeding that likely rankled.

183. See *Bazzle*, 539 U.S. at 455 (Rehnquist, J., dissenting) (arguing that the decision as to whether a contract allows class action arbitration belongs to the courts, that the South Carolina courts' conclusion on this matter directly contravenes the language of the contract and the pro-arbitration purposes of the FAA, and that the common law developed in the South Carolina courts' decisions should, therefore, be preempted).

184. See *id.* at 454 (Stevens, J., concurring in the judgment and dissenting in part) (arguing that "[t]here is nothing in the Federal Arbitration Act that precludes" the South Carolina courts' determinations and that the decision below should be affirmed).

185. See *id.* at 447 (plurality opinion of Breyer, J.) (arguing that the decision as to whether the contract allowed class action arbitration belonged to the arbitrator and vacating the decision and sending it back to the arbitrator for a determination since the arbitrator had not had an untainted opportunity to make that finding). Though the Court was able to obtain a judgment in support of remand, it could not even definitively resolve this lesser issue. See, e.g., Szalai, *supra* note 180, at 17–30 (observing that Justice Stevens sent conflicting signals on this issue while Justice Thomas declined to speak to it at all, leaving the Court divided 4–3 on the issue and its ultimate resolution up in the air).

186. See *Bazzle*, 539 U.S. at 460 (Thomas, J., dissenting) (stating that he would leave the judgment below "undisturbed" because the FAA should not be read to apply in state courts).

187. See *id.* at 454–55 (Stevens, J., concurring in the judgment and dissenting in part) ("[For the reasons stated above], I would simply affirm the judgment of the Supreme Court of South Carolina.

D. Punitive Damages and the Due Process Clause: Constitutionalizing Tort Reform

1. *Punitive Damages and Anti-Litigation Zeal.*—The flowering of a constitutional law of punitive damages was yet another important anti-litigation development of the Rehnquist years. In a sixteen year period, the Court considered at least eight significant constitutional challenges to state court awards of punitive damages, gradually adopting a series of progressively more intrusive federal doctrines limiting the availability of such damages.¹⁸⁸ These well-known and much-debated decisions¹⁸⁹ proceeded in overlapping stages, first providing significant procedural protections to defendants,¹⁹⁰ then affirming the general principle that the Constitution imposes substantive limitations on the amount of damages,¹⁹¹

Were I to adhere to my preferred disposition of the case, however, there would be no controlling judgment of the Court. In order to avoid that outcome, and because Justice Breyer's opinion expresses a view of the case close to my own, I concur in the judgment."').

188. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (striking down a damage award as excessive); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 426, 448 (2001) (holding that appellate courts should review trial court determinations as to the constitutionality of punitive damage awards de novo); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (striking down a damage award as excessive); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994) (holding that the lax standard for appellate review of punitive damages mandated by the Oregon Constitution violated the Due Process Clause of the Fourteenth Amendment); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 446, 465–66 (1993) (reviewing a punitive damage award for excessiveness but finding it within constitutional limits); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991) (reviewing both Alabama's method of assessing punitive damages and the magnitude of an award in a particular case but finding no constitutional problem); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259–60 (1989) (holding that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damage awards and declining to set aside a punitive damage award as excessive); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76–80 (1988) (discussing but declining to answer on prudential grounds major constitutional questions regarding punitive damage awards).

189. For one fine example among the many recent articles that chronicle these decisions, see Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1 (2004). The Allen article also provides a mini-bibliography of the recent discourse on punitive damages. See *id.* at 3 n.7 (citing articles praising and critiquing the Supreme Court's punitive damage decisions); *id.* at 8 n.22 (citing articles discussing the history of punitive damages); *id.* at 8 n.23 (citing articles discussing the normative purposes of punitive damages). For one particularly interesting contribution to the debate about the proper normative conceptualization of punitive damages, see Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 355 (2003).

190. See, e.g., *Honda Motor Co.*, 512 U.S. at 418 (striking down an Oregon appellate review provision on procedural due process grounds); *Pac. Mut. Life Ins. Co.*, 499 U.S. at 23–24 (approving of procedural protections provided by Alabama and relying, in large part on those protections, to validate a large punitive damage award).

191. See, e.g., *TXO Prod. Corp.*, 509 U.S. at 446, 465–66 (reviewing award of punitive damages for excessiveness and finding it within constitutional limits); *Pac. Mut. Life Ins. Co.*, 499 U.S. at 23–24 (same).

and finally framing and applying specific constitutional standards to strike down “excessive” damage awards.¹⁹²

On their face, these decisions serve anti-litigation ends, reducing the available universe of remedies and discouraging litigation in situations where economic harms are minimal or difficult to establish.¹⁹³ In particular, the decisions serve to reduce the utility of litigation as a tool for ensuring corporate compliance with legal and ethical norms,¹⁹⁴ a fact underscored by the substantial resources and energies American business has poured into arguing for these new constitutional protections.¹⁹⁵

Moreover, these decisions reflect an anti-litigation impulse that transcends their direct consequences. As the Justices have occasionally let slip, the pressure to develop this previously barren constitutional corner stems largely from their conviction that punitive damage awards have “run wild.”¹⁹⁶ In expounding that view, and in shifting constitutional doctrine to attempt to alleviate the problem, the Justices are both embracing and perpetuating a critique of the modern American tort regime that is both widely held and extremely controversial. According to this critique, the American system of compensation for private injuries is desperately out of control, producing untold riches for plaintiffs’ lawyers and mammoth rewards for a handful of lucky litigants, warping the incentive structures for businesses and professionals, and causing a concomitant loss of efficiency

192. See *State Farm*, 538 U.S. at 429 (striking down award of damages as excessive); *BMW*, 517 U.S. at 585–86 (same).

193. In theory, cases where compensatory damages are minimal might still be brought as class action lawsuits, and many such suits are filed. However, due both to the substantive and procedural requirements of class action law and the practicalities of class action litigation, class action lawsuits are not always easy to file and settlements in those actions often fail to approach full value. Though this area has not been a major front in the Rehnquist Court’s anti-litigation crusade, the Court’s few decisions in this area have largely been litigation-hostile. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864–65 (1999) (refusing to certify a class containing both present and future claim holders); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (same).

194. The two cases where the Supreme Court has overturned large punitive damage awards illustrate this fact, as both involved questionable corporate conduct that likely (but not definitively) violated legal rules in at least some jurisdictions, but did not necessarily lend themselves to individualized enforcement actions. See *State Farm*, 538 U.S. at 413–14 (involving an insurance company conducting the defense of its insured in a manner that put its own interests ahead of those of its policyholder); *BMW*, 517 U.S. at 563–64 (involving the failure to disclose minor repairs to purchasers of vehicles being marketed as new).

195. Note for example the enormous list of high-priced legal talent participating in the drafting of amicus briefs in each of the punitive damage cases. See, e.g., *Pac. Mut. Life Ins. Co.*, 499 U.S. at 3 (listing counsel).

196. *Id.* at 18; see also, e.g., *TXO Prod. Corp.*, 509 U.S. at 472–73 (O’Connor, J., dissenting) (explaining that the new constitutional law of punitive damages is designed “to restore fairness in what is rapidly becoming an arbitrary and oppressive system”); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O’Connor, J., joined by Stevens J., concurring in part and dissenting in part) (complaining that “[a]wards of punitive damages are skyrocketing” and discussing the “detrimental effect” on the American economy of that trend).

and societal wealth.¹⁹⁷ Importantly, this overarching critique of the alleged tort crisis is not aimed exclusively—or even primarily—at popular susceptibility to maudlin or demagogic appeals or even at broader cultural attitudes about risk and reward, but rather at the legal system that provides a forum for such attitudes.

Punitive damages have become a lightning rod in the popular debate over tort reform not only because they represent a substantial share of the costs of our current regime, but also because they appear by their very nature to be artificial, a creature of our legal regime rather than a reflection of an underlying physical or economic reality.¹⁹⁸ Though punitive damages have a long pedigree in Anglo-American jurisprudence, their availability in the end reflects a policy choice, one which increasing numbers of politicians and theorists have come to question.¹⁹⁹ Moreover, as critics of the current system

197. Within the Court, the most explicit statement of this critique comes from Justice O'Connor. See, for example, Justice O'Connor's opinion in *Browning-Ferris*:

Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal. The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.

492 U.S. at 282 (citations omitted). For a representative external expression of the critique, interesting only because of the identity of the author, Theodore B. Olson, see *Was Justice Served?*, WALL ST. J., Oct. 4, 1995, at A14 ("The civil justice system seems . . . demented, with freakish punitive damage bonanzas for persons who pour coffee on themselves or ricochet golf balls into their own foreheads." (quoting Olson)). The argument that there is a "tort crisis" afoot has gained significant initial traction from the work of a number of legal scholars. See, e.g., George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1552-60 (1987) (arguing that tort law at the time had restricted the availability of insurance, creating an insurance crisis); George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497, 497 (1987) (arguing that the "single most important phenomenon of the recent tort crisis . . . is the withdrawal of the insurance industry from the business of insurance"). But the idea has also been the subject of much subsequent academic criticism. See, e.g., Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987) ("The real tort crisis is old, not new. It is a crisis of underclaiming rather than overclaiming."); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 396 (1999) ("There are problems in the tort system, just as there are difficulties in every complex organization, but the crisis described by most tort reformers does not exist.").

198. See, e.g., *State Farm*, 538 U.S. at 416 ("[I]n our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citations omitted)); see also *Cooper Indus.*, 532 U.S. at 432 (arguing similarly); *BMW*, 517 U.S. at 568 (tying the existence of punitive damages to the "state's legitimate interest" rather than that of private parties).

199. See, e.g., James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that has Outlived its Origins*, 37 VAND. L. REV. 1117, 1154-65 (1984) (arguing that the punitive damages system is undesirable theoretically, legally, and economically); Helen Dewar, *Senate GOP Is*

have sharpened their attack on punitive damages, they have increasingly questioned whether the perpetuation of such damages continues to reflect a majoritarian political choice or instead reflects only the entrenched interests of lawyers and judges, who profit respectively from the substantial fees produced by large damage awards and the power implicit in formulating the rules that govern American business practices.²⁰⁰ Finally, the evolution of punitive damages into a significant method of aggregate dispute resolution has triggered further concerns about their legitimacy, transplanting into this context familiar debates about the appropriateness of litigation for resolving complicated, policy-ridden, multi-party disputes.²⁰¹

Particularly when viewed in the context of the national tort reform movement, the Rehnquist Court's decision to take on the project of developing a constitutional law of punitive damages is big news. Here, unlike in the other areas thus far discussed,²⁰² the Justices are not simply interpreting statutes or crafting common law doctrines that might be overturned by congressional enactment. Instead, they are taking the bold step of determining that certain aspects of our existing litigation culture so transcend the Constitution's basic fairness norms that they are *per se verboten*. Leaving aside for the purposes of this Article the endlessly complicated question of whether our constitutional regime empowers judges to read into the Constitution prohibitions on a narrow set of particularly odious policy choices,²⁰³ what is notable is the Court's decision to add the tolerance of certain seemingly excessive punitive damage awards to the short list of substantive policies that cross that threshold and are thus prohibited by the Due Process Clause. It is hard to imagine better evidence regarding the centrality of the Court's hostility to litigation.

2. *Some Lessons from the Punitive Damages Cases.*—Like all the other doctrinal areas examined, the realm of punitive damages provides further pointillist evidence as to the nature and substance of the Rehnquist Court's hostility to litigation. First, as suggested above, the development of anti-punitive damage law suggests that, contrary to the suggestion of other

Blocked on Court Award Limits, WASH. POST, Oct. 23, 2003, at A4 (describing closely fought congressional battles over tort reform and punitive damages).

200. For the view that lawyers and our litigation culture are to blame, see, for example, PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* 56–62 (2001).

201. For the best general discussion of how we ought to come to terms with the fact that punitive damages have become a form of aggregate settlement, see Sharkey, *supra* note 189. Compare *supra* subpart III(A) on the Rehnquist Court's skepticism about the role of the courts in resolving policy-ridden, multi-party disputes.

202. See generally discussion *supra* subparts III(A)–(C).

203. Justices Scalia and Thomas have dissented from the most recent decisions on the grounds that courts lack such authority. See, e.g., *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* at 429–30 (Thomas, J., dissenting).

commentators,²⁰⁴ the Rehnquist Court's hostility to litigation cannot be cabined to non-constitutional cases. To the contrary, a majority of the Justices—expressly motivated by a growing concern with the fairness and efficacy of our modern litigation culture—affirmatively turned to the Constitution for a remedy, extrapolating novel limitations on the civil litigation process from the Fourteenth Amendment's Due Process Clause. As my discussion of other areas of the Court's jurisprudence will demonstrate,²⁰⁵ this is not an isolated instance of the Court's policy fears overrunning its best constitutional impulses, but rather an example of the degree to which a cultured antipathy towards litigation has become a fundamental filament of the Court's judicial philosophy.

Second, these decisions suggest that the Court's hostility to the institution of Litigation transcends concerns about the institutional competence of the courts and incorporates a fundamental, substantive distrust for the specific processes and doctrines that structure the modern litigation enterprise.²⁰⁶ While I remain convinced that the Court's hostility to litigation is, at most, only partially theorized, these decisions in both words and deed target very specific aspects of our litigation culture: non-compensatory damages that have "run wild,"²⁰⁷ local courts that impose sanctions intended not only to settle the dispute before them but also to punish and deter conduct aimed at non-parties,²⁰⁸ and lawyers who use the scale and expense of modern litigation to exact settlements without a finding of liability.²⁰⁹ These opinions enacting constitutional tort reform, no less than the speeches calling for statutory tort reform, echo with a critique of the institution of Litigation that is particularized and firmly grounded in the authors' perceptions of our contemporary dispute resolution culture.

Finally, the punitive damages cases remind us that hostility to litigation, while central to the Court's collective intellectual matrix, is in constant competition with other themes and influences as the Justices intellectually

204. See, e.g., Meltzer, *supra* note 62, at 343–45 (limiting his discussion of similar issues to "subconstitutional matters" and drawing a dividing line between the Court's "passivity" on such matters and its "constitutional activism").

205. See *infra* Part IV (discussing constitutional federalism cases); Part V (discussing the Court's constitutional analysis in the 2000 presidential election cases).

206. Cf. *supra* subpart III(C) (arguing that the Court's arbitration decisions support two different readings of the wellsprings of the Court's anti-litigation impulse, one more substantive and particularized than the other).

207. See, e.g., *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (noting the Court's ongoing "concern about punitive damages that 'run wild'").

208. See, e.g., *State Farm*, 538 U.S. at 420 (explaining that one of the things that made the award constitutionally suspect was that "[t]his case . . . was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country"); *id.* at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . .").

209. Cf. *id.* at 422 (noting that "much" of the underlying conduct that contributed to the high punitive damage award in the case was "lawful where it occurred").

and viscerally process novel issues. This is most vividly illustrated by the sharp divisions among the Justices provoked by the shift in focus from procedural to substantive limitations on state court punitive damage awards. While all (or almost all)²¹⁰ of the Justices express at least some degree of frustration with the modern litigation culture, some of the Court's most conservative members dissent from the imposition of substantive due process limits on the ground that such a limitation—while perhaps wise—is not properly discernible from the Constitution.²¹¹ Intriguingly, the drive for substantive constitutional review of punitive damage awards is led by some of the Court's more liberal and moderate members, jurists who in other contexts manifest substantial hostility to litigation but by no means lead the Court in the intensity of their hostility.²¹² It seems that the willingness of the

210. The possible exception is Justice Ginsburg who, since she has joined the Court, has joined none of the decisions imposing constitutional limitations on punitive damages. *But see State Farm*, 538 U.S. at 431 (Ginsburg, J., dissenting) ("The large size of the award upheld by the Utah Supreme Court in this case indicates why damages-capping legislation may be altogether fitting and proper.").

211. Justices Scalia and Thomas have consistently dissented on this ground. *See, e.g., State Farm*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* at 429–30 (Thomas, J., dissenting). Justice Ginsburg, a relative liberal, has also consistently dissented, though on slightly more ambiguous grounds. *See, e.g., State Farm*, 538 U.S. at 430–31 (Ginsburg, J., dissenting) (rejecting the rule of *BMW* and *State Farm*, primarily for historical and federalism-tinged policy reasons); *BMW*, 517 U.S. at 607 (Ginsburg, J., dissenting) (same). Chief Justice Rehnquist dissented from *BMW* (and from some of the preliminary cases laying the groundwork for *BMW* and *State Farm*)—*see, e.g., id.* (joining Justice Ginsburg's dissent), and *Honda Motor Co.*, 512 U.S. at 436 (Ginsburg, J., joined by Rehnquist, C.J., dissenting)—but joined the Court's opinion in *State Farm*. Whether he thought there was a substantial difference between the two cases, simply acquiesced in the new rule on stare decisis grounds, or came to appreciate the litigation-foreclosing consequences of the *BMW* rule, is an open and ultimately unanswerable question.

212. Justice O'Connor has been the Court's staunchest advocate of strict constitutional policing of the magnitude of punitive damage awards. *See, e.g., TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 472–73 (1993) (O'Connor, J., dissenting) (arguing for much more strident substantive due process review of state court punitive damage awards); *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 283 (1989) (O'Connor, J., dissenting) (arguing for federal constitutional review of punitive damage awards under the Eighth Amendment's Excessive Fines Clause). Justices Kennedy and Stevens have been only one step behind her in their enthusiasm for such reforms and have authored the major recent opinions. *See State Farm*, 538 U.S. at 416–18 (Kennedy, J.) (arguing that the Fourteenth Amendment's Due Process Clause imposes procedural and substantive limits on punitive damage awards); *BMW*, 517 U.S. at 562 (Stevens, J.) ("The Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a 'grossly excessive' punishment on a tortfeasor."). It can be argued that Justice Stevens's views in this area appear to be buttressed by his substantial commitment to reinvigorating judicial review of excessive criminal punishments. This commitment might have sensitized him to the issues involved in excessive punitive damages actions or it might have made his rulings in these cases appear strategically useful. *See, e.g., Ewing v. California*, 538 U.S. 11, 32–35 (2003) (Stevens, J., dissenting) (arguing that "by broadly prohibiting excessive sanctions, the Eighth Amendment directs judges to exercise their wise judgment in assessing the proportionality of all forms of [criminal] punishment"). For good general discussions of the relationship between proportionality review in the criminal law and punitive damages contexts, *see, for example, Erwin Chemerinsky, The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004); Pamela S. Karlan, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 910–12 (2004); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality*

various Justices to embrace constitutional tort reform depends more on the strength of each Justice's cross-cutting influences and intellectual commitments than on the intensity of the individual Justice's particular shade of litigation hostility.²¹³

IV. Hostility to Litigation and the Rehnquist Court's Federalism Jurisprudence

The Rehnquist Court's propensity to limit access to courts, to deny or narrowly construe available remedies, and, more generally, to impose heretofore unknown constitutional and common law roadblocks to litigative solutions can be demonstrated fairly easily by the kind of case survey attempted in the pages above.²¹⁴ However, to understand just how deeply the Court's hostility to litigation runs, it is necessary to pull back from cases that are self-consciously "about" the capabilities of the courts and to examine whether the Court's attitudes towards litigation color its perceptions or motivate its treatment of other issues.

In that vein, this section explores the interaction of the Court's hostility to litigation with its federalism jurisprudence.²¹⁵ Examining the contours of the Court's recent federalism cases through the lens of hostility to litigation offers significant insight into the perplexing question of why—if the Court is truly motivated by concern for increasing the power and autonomy of the

Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards, 86 VA. L. REV. 1249, 1285–1301 (2000).

213. The Court's strong instinctual commitment to federalism is also crucially implicated by the decisions in the punitive damages cases. *See, e.g.*, Allen, *supra* note 189 (exploring the federalism implications of these cases). I do not make more of this connection, however, because federalism concerns emerge on both sides of the debate over substantive federal review of state court punitive damages awards. *Compare BMW*, 517 U.S. at 570–74 (arguing that federal constitutional review is necessary to prevent one state from nullifying the independent policy judgments of other states) *with id.* at 607–08, 613–14 (Ginsburg, J., dissenting) (arguing that federal constitutional review interferes with the states' inherent authority to structure their tort systems according to their own policy preferences).

214. *See supra* Part III.

215. This Article's decision to treat the interaction of its proposed theme with the Court's federalism jurisprudence is dictated not only by the abundance of fertile ground created by juxtaposing the two themes, but also by the centrality of the federalism cases to the current Court's legacy. While a handful of commentators have downplayed the importance of the Rehnquist Court's federalism cases, *see, for example*, Garnett, *supra* note 11, at 3–6, they represent a decided minority. Given the near consensus that the Rehnquist Court's claim to fame rests in great part with its federalism decisions, the developing conventions of Rehnquist Court proto-history (appropriately) require an explanation as to how a proposed addition to our collective understanding of the Court's intellectual matrix influenced (or failed to influence) those seminal cases. Several successful attempts have been made to explain how other themes fit with the Rehnquist Court's federalism decisions. *See, e.g.*, Fallon, *supra* note 1, at 433–34 (reading leading federalism cases as reflecting the Court's "conservatism"); Kramer, *supra* note 1, at 137–62 (reading leading federalism precedents as reflecting a commitment to "judicial supremacy"); *cf.* Colker & Scott, *supra* note 1, at 1370–72 (noting the Court's propensity to "diss" states by overturning state statutes and overruling state officials' actions and using those cases to argue that the Court's purported commitment to federalism is a subsidiary theme in the Rehnquist Court's jurisprudence).

states—it has chosen to pursue and extend particular federalism-oriented doctrines (such as sovereign immunity) while failing to pursue others (such as a truly robust Commerce Clause jurisprudence) and affirmatively eschewing still others (such as a less expansive notion of preemption or greater autonomy for state courts from federal legislative intrusion).²¹⁶ Put simply, the Court has shown its greatest sympathy for federalism doctrines that protect the states from litigation²¹⁷ and has shown almost no interest in developing new doctrines that provide the states with greater autonomy to shape their own institutions if that autonomy could conceivably be used to develop a more litigation-friendly environment.²¹⁸

A. Sovereign Immunity

1. *The Court's Decisions.*—The Rehnquist Court's sovereign immunity decisions need no introduction. In approximately a dozen important cases reaching back roughly a decade, the Court has reinvigorated the states' immunity from lawsuits by private citizens in a myriad of ways. In short order, the Court has reaffirmed and firmly constitutionalized the expansive and counter-textual reading of the Eleventh Amendment propounded in the much criticized²¹⁹ nineteenth-century case *Hans v. Louisiana*,²²⁰ held that Congress may not abrogate states' Eleventh Amendment immunity under any of its Article I powers,²²¹ developed a fairly intrusive test to determine whether Congress has properly abrogated the states' immunity pursuant to its Fourteenth Amendment powers,²²² and applied that test with increasing rigor

216. For an attempt to answer this question from a very different perspective, one might say from within the Court's federalism jurisprudence, see Young, *supra* note 13.

217. See *infra* subpart IV(A) (discussing sovereign immunity cases).

218. See *infra* section IV(B)(1) (discussing preemption cases and cases raising the issue of states' autonomy to structure their own court systems); see also *supra* notes 174–176 and accompanying text (dissenting the Court's decisions curtailing states' autonomy to impose substantial procedural or substantive restrictions on the availability of arbitration).

219. Criticism of *Hans* is widespread. See Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 487 n.1 (2001) (collecting the leading articles critical of modern state sovereign immunity doctrine). For a profound attack on the integrity of the *Hans* decision from an historical perspective, see Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927 (2003); see also *id.* at 1943 n.61 (collecting further sources).

220. 134 U.S. 1 (1890).

221. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69–70, 72–73 (1996) (overruling *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), and reading *Hans* to state that the Eleventh Amendment, not federal common law, prevents citizens from suing their own states in federal court for violations of federal law and using that reading to hold that Congress cannot abrogate state sovereign immunity under any of its Article I powers). But see *Cent. Va. Comm. Coll. v. Katz*, 126 S. Ct. 990 (2006) (holding that at the time of the founding the states gave up their sovereign immunity against most lawsuits filed pursuant to valid Bankruptcy Clause legislation).

222. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (developing the “congruence and proportionality” test for assessing whether legislation is properly enacted pursuant to Congress's authority to enforce the terms of the Fourteenth Amendment). Because of the Court's holding the prior term in *Seminole Tribe*, 517 U.S. at 59, Congress is only empowered to abrogate state

and skepticism.²²³ At the same time, the Court has—without relying on the Eleventh Amendment or any other textual provision—held that the Constitution’s structure requires that the states be accorded sovereign immunity from suits in their own courts (absent their consent)²²⁴ and from federal administrative proceedings that bear significant indicia of adjudication.²²⁵ In a variety of less well-known cases, the Court has also narrowed the well-established doctrine whereby individuals may, notwithstanding sovereign immunity, seek injunctions against state officials in their official capacity,²²⁶ made it easier for state officials to obtain dismissal of lawsuits on sovereign immunity grounds at an early stage in the litigation process,²²⁷ and overruled precedent suggesting that a state does not possess full Eleventh Amendment immunity when it engages in routine commercial activity.²²⁸

sovereign immunity pursuant to its Fourteenth (and perhaps Fifteenth) Amendment Enforcement Clause powers. Hence, the *Boerne* decision, while not itself an Eleventh Amendment immunity case, had obvious and immediate impact on that area of law.

223. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Title I of the Americans with Disabilities Act is not valid Fourteenth Amendment Enforcement Clause legislation and, thus, does not validly abrogate the states’ Eleventh Amendment immunity); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding same with regard to Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding same with regard to Patent and Plant Variety Protection Remedy Clarification Act). *But see Tennessee v. Lane*, 541 U.S. 509 (2004) (holding, over the strenuous dissents of Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, that Title II of the Americans with Disabilities Act is valid Enforcement Clause legislation at least to the extent that it ensures access to courtrooms and, thus, validly abrogates state sovereign immunity in the case at hand); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding, over strenuous dissents of Justices Scalia, Kennedy, and Thomas, that the family-care provision of the Family and Medical Leave Act is valid Enforcement Clause legislation and, thus, validly abrogates state sovereign immunity).

224. *Alden v. Maine*, 527 U.S. 706 (1999).

225. *Fed. Mar. Comm’n v. S. C. State Ports Auth.*, 535 U.S. 743 (2002).

226. See, e.g., *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997) (holding the *Ex parte Young* doctrine inapplicable to an action by an Indian tribe and its members against a state seeking declaration of ownership rights in certain lands because allowing the action would strike at the heart of state sovereignty); see also *Seminole Tribe*, 517 U.S. at 73–75 (holding *Ex parte Young* relief unavailable in the case at issue because to allow such an action would thwart a “crafted and intricate remedial scheme” developed by Congress). In *Coeur d’Alene*, 521 U.S. at 273–80, Justice Kennedy, joined by Chief Justice Rehnquist, suggested that a broad *Ex parte Young* doctrine was inconsistent with the Court’s evolving sovereign immunity jurisprudence and that the doctrine should be drastically limited or even expressly overruled. Though the majority of the Court did carve out an exception to the preexisting doctrine and find in favor of Idaho’s sovereign immunity claim, they rejected Justice Kennedy’s offer to use a sledgehammer where a chisel would do. See *id.* at 288–97 (O’Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment).

227. See *P. R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (holding that states may take interlocutory appeals from decisions of trial courts denying motions to dismiss on Eleventh Amendment grounds).

228. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (overruling *Parden v. Terminal R. of Ala. Docks Dep’t*, 377 U.S. 184 (1964)). The Court has, however, declined opportunities to further weaken the waiver doctrine. See, e.g., *Frew v. Hawkins*, 540 U.S. 431 (2004) (unanimously overruling a lower court decision holding that federal court actions to enforce the terms of consent decrees are subject to the Eleventh Amendment unless

With few if any exceptions,²²⁹ the Rehnquist Court's most momentous sovereign immunity decisions have come over the vigorous dissent of Justices Stevens, Souter, Ginsburg, and Breyer. In explaining and defending its decisions in the face of persistent and voracious internal and external criticism,²³⁰ the five-member majority has developed a number of themes. Two, however, have grown to dominate the Court's rhetoric: fidelity to history and the "dignity" appropriately accorded the states.

First, the Justices committed to a broad view of state sovereign immunity have strenuously argued that a proper reading of history commands their approach.²³¹ In broad terms, they have argued that eighteenth century practice and understanding support expansive immunity for all sovereigns, that the few relevant nineteenth century cases embrace it, and that the few recent decisions that suggest otherwise are fragmented, under-theorized, and ill-advised.²³² On the other hand, the dissenting Justices

terms of the voluntary decree meet the congruence and proportionality test); *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (unanimously overruling a lower court decision holding that state does not waive Eleventh Amendment immunity by removing case to federal court). Nor has the Court been willing to abandon the traditional rule that the Eleventh Amendment does not bar *in rem* actions involving states as long as the federal court has properly obtained jurisdiction over the property at issue. See, e.g., *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).

229. The usual dissenters have, of course, been in the majority in the cases in which the Court has chosen not to broaden sovereign immunity. For partial lists of such cases, see *supra* note 226, and *infra* note 231. Of the decisions cited therein that expand the scope of sovereign immunity, Justices Stevens, Ginsburg, and Breyer dissented from every one in which they participated. Justice Souter joined the majority opinion in *Puerto Rico Aqueduct*, but has dissented from all the others.

230. For some (but by no means all) of the voracious external criticism aimed at the Court's recent sovereign immunity jurisprudence, see the works cited in Hill, *supra* note 219, at 487 n.1. As for internal criticism, each major decision has produced at least one stinging dissent (usually two or three). Some of the highlights include *Federal Maritime Commission*, 535 U.S. at 772 (Breyer, J., dissenting); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting); *Alden v. Maine*, 527 U.S. 706, 760 (1999) (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 100 (Souter, J., dissenting); *Puerto Rico Aqueduct*, 506 U.S. at 148 (Stevens, J., dissenting). Perhaps the most striking thing about the dissents in these cases is the degree to which they forthrightly refuse to accept the majority's take on sovereign immunity as binding precedent. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97-98 (2000) (Stevens, J., dissenting) ("Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. . . . The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden v. Maine*, *Florida Prepaid* . . . , and *College Savings Bank* . . . , represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.") (citations omitted).

231. See, e.g., *Alden*, 527 U.S. at 754 ("In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."); *Seminole Tribe*, 517 U.S. at 68 (arguing that sovereign immunity jurisprudence reflects a fundamental historical "postulate," insisting that the caselaw "must proceed with fidelity to this century-old doctrine," and criticizing the dissent for rejecting this historical-doctrinal approach for "a theory cobbled together from law review articles and its own version of historical events"); cf. *Alden*, 527 U.S. at 763 (Souter, J., dissenting) ("The Court's principal rationale for today's result, then, turns on history: was the natural law conception of sovereign immunity as inherent in any notion of an independent State widely held in the United States in the period preceding the ratification of 1788 (or the adoption of the Tenth Amendment in 1791)?").

232. See, e.g., *Alden*, 527 U.S. at 712-40; *Seminole Tribe*, 517 U.S. at 54-55, 65-66, 68-70.

have—with equal vigor—offered a counter-narrative, arguing that the all-encompassing sovereign immunity the majority embraces was in historical decline by the time of the American founding, that the Eleventh Amendment and the early cases interpreting it reflect a commitment to a more cabined understanding of the states' immunity, and that the twentieth-century Court's struggles to define the contours of that immunity was a principled attempt to give effect to that moderate course.²³³ While the benefits and strengths of these two approaches have excited much academic commentary,²³⁴ few if any commentators have taken seriously the notion that the current Court's major rift over the proper scope of sovereign immunity results primarily from disagreements about historical facts reached after neutral examination of the relevant sources.

To the contrary, most commentators have assumed that some normative vision underlies the Rehnquist Court's adoption of a broad theory of state sovereign immunity (and, conversely, the dissenters' adoption of a more modest version). In pursuing the sovereign immunity revolution's motivating rationale, scholars have increasingly taken as their starting point the Court's frequent references to the role sovereign immunity plays in protecting the dignity of the states.²³⁵ First appearing in the Court's opinion in a relatively minor 1993 case,²³⁶ references to state dignity immediately

233. See, e.g., *Alden*, 527 U.S. at 760 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 100 (Souter, J., dissenting).

234. For a few of the many interesting articles discussing this history, see Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1207–09 (2001); John F. Manning, *The Eleventh Amendment and Precise Constitutional Texts*, 113 YALE L.J. 1663, 1674–86 (2004); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

235. For interesting commentary homing in on the "dignity" rhetoric, see Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 250–56 (2000); Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001); Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133 (2000); Daniel J. Meltzer, Essay, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1038–47 (2000); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 51–58.

236. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). As will be discussed below, see *infra* notes 271–276 and accompanying text, *Puerto Rico Aqueduct* involved the question of whether district court orders declining to dismiss actions against state entities on Eleventh Amendment grounds are immediately appealable "collateral orders." Writing for the Court, Justice White answers that question in the affirmative, concluding that the Eleventh Amendment is meant to protect states not only from liability but also from coerced participation in lawsuits brought by private parties. See *id.* at 145–47. In support of that conclusion and of the relatively uncontroversial resolution of the case at hand, Justice White rescues from the dustbin of history a powerful and loaded sentence from *In re Ayers*, 123 U.S. 503 (1887), a relatively obscure nineteenth-century case: "'The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Id.* at 146 (quoting *Ayers*, 123 U.S. at 505). He then adds a second iteration of the dignity

began decorating the Court's sovereign immunity opinions and quickly became *de rigueur*.²³⁷ When, in cases such as *Alden v. Maine*²³⁸ and *Federal Maritime Commission v. South Carolina State Ports Authority*,²³⁹ the Court began to address sovereign immunity claims untethered to the text of the Eleventh Amendment, dignity earned a promotion from rhetorical flourish to explanatory principle. As Justice Thomas explained in an opinion that provides the fullest articulation of the dignity principle, "[t]he preeminent purpose of state sovereign immunity is to accord the States the dignity that is consistent with their status as sovereign entities."²⁴⁰

2. *Unpacking the Dignity Rationale*.—The majority Justices' reliance on the dignity rationale as the normative basis for their broad vision of sovereign immunity has excited substantial commentary and critique from both inside and outside the Court. From within, the four Justices who have not signed up for the sovereign immunity revolution, have been uncharacteristically caustic in their dismissal of the dignity rationale, with Justice Stevens going so far as to label it "embarrassingly insufficient."²⁴¹ The dissenters have argued that there is nothing inherently undignified about requiring a sovereign to conform its conduct to the law. Indeed, as Justice Souter is wont to point out, certain well-grounded conceptions of dignity suggest that it enhances rather than diminishes an entity's dignity if it is

language all his own, emphasizing "the importance of ensuring that the States' dignitary interests can be fully vindicated." *Id.* at 146; *see also id.* (stressing "the respect owed [the states] as members of [a] federation").

237. *See, e.g., Coeur d'Alene*, 521 U.S. at 268 (Kennedy, J., joined by Rehnquist, C.J., announcing the judgment of the Court) (referring to the Eleventh Amendment's role in protecting the "status and dignity" of the states); *Seminole Tribe*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct* for the sentence it revived from *Ayers*); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 31, 41, 47, 52 (1994) (repeatedly stating that an action under a federal compact does not insult a state's "dignity" as support for the argument that it does not violate the Eleventh Amendment).

238. In *Alden*, 527 U.S. at 706, the Court based its conclusion that nonconsenting states are immune from suits brought in their own courts by private parties to enforce federal law on the Court's understanding of the "essential principles of federalism," *id.* at 748, and the "structure of the Constitution," *id.* In several crucial places in the opinion, the Court emphasized that safeguarding the dignity of the states is one of those essential principles and that, as a result, the structure of the Constitution commands rules that protect the states from dignitary harms (such as the harm of compelled litigation). *See, e.g., id.* at 714, 715, 749.

239. In *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002), the Court offered both its deepest reliance on the "dignity" principle and its fullest explication. In deciding that sovereign immunity precludes federal administrative agencies from adjudicating private complaints against nonconsenting states if the administrative proceedings in question sufficiently resemble civil litigation, the Court (through Justice Thomas) noted once again that the Eleventh Amendment is "but one particular exemplification" of a general principle of sovereign immunity, *id.* at 753, and then made the dignitary implications of a proceeding the touchstone for the inquiry into whether such a proceeding violated the general principle, *id.* at 760–61. In the two central normative paragraphs of his opinion, Justice Thomas references dignity four times (once in each of the first four non-quotation sentences), makes additional references to "indignity" and the "becoming"-ness of judicial proceedings, and includes nary a mention of any other value. *Id.*

240. *Id.* at 760.

241. *Puerto Rico Aqueduct*, 506 U.S. at 151 (Stevens, J., dissenting).

willing and able to demonstrate fidelity to the law.²⁴² Moreover, Justice Stevens has argued—with some significant support in the historical record²⁴³—that “Chief Justice Marshall early on laid to rest the view that the purpose of the Eleventh Amendment was to protect a State’s dignity.”²⁴⁴

Outside the Court, the dignity rationale has been dissected as much for what it fails to say as for what it does say. According to the majority of commentators, the dignity argument is cryptic and under-theorized.²⁴⁵ In the memorable phrase of one commentator, the sovereign immunity cases reveal “five authors in search of a theory.”²⁴⁶ Never themselves at a loss for theories, scholars who have recognized the dignity leitmotif have posited several potential explanations for the Court’s embrace of the dignity rhetoric.²⁴⁷ Some have suggested that the Court’s concern is substantive and that dignity is a shorthand term for the respect that the Court is going to accord to state autonomy in its new structuralist constitutionalism.²⁴⁸ Others have posited that the Court’s concern is expressivist and that the language of dignity is intended to inculcate a greater public respect for the states and for a more balanced federalism.²⁴⁹ Still others have suggested that the language of

242. See, e.g., *Alden*, 527 U.S. at 803 n.35 (Souter, J., dissenting) (arguing, based in part on classic sources, that the dignity of the state is enhanced, not diminished, by adherence to the law).

243. It is uncontested that after *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the dignity rationale did not appear in the Court’s sovereign immunity jurisprudence until *In re Ayers*, 123 U.S. 503 (1887); that with the lone exception of *Ayers* the Court did not affirmatively rely on the dignity rationale in any cases until the last quarter of the twentieth century; and that the only decision even mentioning the word dignity in this context in the first three-quarters of that century brought up the argument in order to reject it. See *Petty v. Tenn.-Mo. Bridge Comm’n*, 359 U.S. 275, 276 n.1 (1959). It also appears quite clear from the text of *Cohens* that Marshall was genuinely of the opinion that the Eleventh Amendment had little or nothing to do with the dignity of the states. On the other hand, to argue that Chief Justice Marshall “laid the argument to rest” implies that, due either to his access to the framers of the Amendment or the strength of his argument, his conclusion on this issue has been and should be treated as conclusive. Some scholars have argued to the contrary, suggesting that *Ayers* and *Cohens* represent coherent alternative readings of the Amendment, both of which have always had their adherents. See, e.g., Dodson, *supra* note 235, at 798–803 (tracing the history of the Supreme Court’s Eleventh Amendment jurisprudence and reading that story as, to a large extent, turning on sharp disagreements between those advocating the reading of the Eleventh Amendment propounded in *Cohens* and those supporting the *Ayers* reasoning). Moreover, as I argue below, see *infra* text accompanying notes 261–264, there is reason to believe that the dignity argument currently en vogue differs in substance from the one Chief Justice Marshall repudiated.

244. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 96 (1996) (Stevens, J. dissenting) (citing *Cohens*, 19 U.S. (6 Wheat.) at 406–07).

245. See, e.g., Smith, *supra* note 235, at 5 (referring to the Court’s dignity rhetoric as “increasingly odd,” “arguably oxymoronic,” and a “puzzle”).

246. See Meltzer, *supra* note 235, at 1.

247. For some of the leading works, see *supra* note 235.

248. See, e.g., Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental “States’ Rights,”* 46 WM. & MARY L. REV. 213, 219–20 (2004) (discussing the Court’s new focus on dignity and other attributes of sovereignty as reflecting identification of “rights” belonging to states in the structure of the Constitution).

249. See, e.g., Caminker, *supra* note 235, at 82 (suggesting that dignity rhetoric might be directed at avoiding “expressive harm” implicit in demeaning a sovereign state).

dignity is borrowed from international relations and reflects an analytical move by which the Court is now conceptualizing the various United States as genuine (albeit limited) sovereigns.²⁵⁰

While the scholarly arguments tracing the roots of the dignity language and explaining its purpose are insightful, they lack the ability to explain why sovereign immunity has become a particular focus of the Court's efforts to adjust the balance of federalism. It may be that the Court (purposefully or unconsciously) uses the language of dignity in explaining its move towards providing greater protections for the states because it wants to encourage the public to accord greater respect to the states or because it conceptualizes the states as retaining some of the attributes of nation-states, but that does not explain why sovereign immunity—rather than, say, preemption or the independence of state judicial proceedings—serves as the doctrinal platform for the Court's rhetoric. Similarly, it may be that the Court views maintaining the dignity of the states as an essential and enforceable constitutional postulate, but, again, that does not explain why the Court views one particular kind of intrusion into the states' autonomy—compelled participation in judicial proceedings brought by private parties—as injurious to that dignity while myriad other intrusions into the states' autonomy pass constitutional muster.

While the answer as to why sovereign immunity has excited the Court's particular interest is likely complicated and multi-factored, the Rehnquist Court's hostility to litigation is a central, and often overlooked, part of the explanation. To put this observation in the simplest terms, one need only perform a little linguistic parlor trick: Thus far most of the scholarship on the sovereign immunity decisions has explored why the Court has so vociferously exclaimed, "You can't sue *states*!" Much can be learned, however, from shifting the emphasis in that sentence and reconceptualizing the Court's sovereign immunity decisions as instead exclaiming, "You can't *sue states*!"

To unpack that argument, harken back to the decisions discussed in Part III above. In case after case, in wildly divergent areas of the law, the Court reacts as if there is something discomfiting and vaguely disreputable about the use of the litigation process to resolve disputes and collectively administer justice. This under-theorized hostility to litigation operates on two levels. First, the Court appears to be influenced by an unspoken assumption that there is something undignified about the litigation process itself, that the lawsuit-friendly legal culture we have developed scars those who participate in it. The notion that anyone can be dragged into court against their will to answer the unscreened claims of another citizen—while perhaps accepted intellectually by the Justices as a necessary democratic

250. See, e.g., Smith, *supra* note 235, at 5–6 (focusing on "law-of-nations doctrine of foreign state sovereign immunity" as a source for the "dignity" idiom).

mechanism²⁵¹—seems to stoke the Justices’ unconscious fears and tap into a broader cultural anxiety about litigation.

Moreover, the Court’s hostility to litigation is not evenly distributed over all types of litigants or lawsuits. Certainly, as demonstrated above, the Court’s hostility to litigation extends to purely private tort and contract disputes.²⁵² However, the Court’s concern is particularly pronounced in areas where the legal action in question in some way transcends the private purposes of the plaintiff—either because the plaintiff is seeking to enforce a statute which seems to vest primary enforcement authority in a public agency,²⁵³ because the defendant in question is a governmental body or a public official,²⁵⁴ or because the relief sought is designed not just to compensate the plaintiff but also to achieve broader social purposes.²⁵⁵

Looked at through the lens of these twin observations, the Court’s focus on sovereign immunity as a crucial bulwark in protecting state dignity and, therefore, as a constitutional priority makes perfect sense. As the Court sees it, compelling an unwilling state to defend a private lawsuit for damages threatens state dignity for much the same reason and in much the same way that subjecting a private party to such a suit diminishes the dignity and threatens the status of that private party.²⁵⁶ The difference of course is that, while ensuring the dignity of private parties is a laudable policy goal the Court does its best to protect when opportunity arises, protecting the dignity of the states is a constitutional command under the current majority’s understanding of federalism.

Further, while the Court’s indignity-detector is activated by most forms of litigation, the Court’s particular aversion to litigation that implicates the public good in some broader sense is fully at play in the sovereign immunity context. Here, private parties are seeking relief from the state; their actions have the potential to burn off or require the redistribution of public resources,

251. A proverbial idea most traditionally expressed by noting that in a republic, “no man is above the law.” *Cf.* *Nixon v. Fitzgerald*, 457 U.S. 731, 764, 766 (1982) (White, J., dissenting) (“Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong.”).

252. *See, e.g., supra* subpart III(A) (discussing the Court’s hostility to remedies); *supra* subpart III(C) (discussing the Court’s Federal Arbitration Act jurisprudence).

253. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (holding a § 1983 action inappropriate in part because Congress adopted a remedial scheme that focused on government enforcement); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding an implied private right of action inappropriate for similar reasons).

254. *See, e.g., supra* subpart III(B) (discussing qualified immunity cases).

255. *See, e.g., supra* subpart III(D) (discussing punitive damages cases and explaining how the societal purpose of such damages is a mark against them for the Court).

256. To reiterate, the heart of the Justices’ concern appears to be the starkly and often crassly democratic nature of our legal system, the belief that anyone (even a person or entity of substantial status) can be dragged into court by a private plaintiff to answer unscreened claims of wrongdoing under the requirement that he (or she or it) answer the allegations satisfactorily in order to avoid monetary liability.

to label the state as a transgressor of federal law, and even to exact changes in state policies.²⁵⁷ To the extent, therefore, that the Rehnquist Court's broader hostility to litigation is exacerbated by a sense that it is inappropriate, inefficient, or undemocratic to make policy through litigation, the recent sovereign immunity cases are particularly well-suited for drawing down the ire of these Justices.

Interestingly, treating the Rehnquist Court's focus on sovereign immunity in general (and on the rhetoric of dignity more specifically) as stemming from the Court's hostility to litigation suggests that the underlying dignity rationale broached by the current Court is somewhat different than the dignity rationale raised and repudiated by Chief Justice Marshall in *Cohens v. Virginia*.²⁵⁸ In that case, the proposed injury to the state's dignity stemmed from the insult to its sovereignty allegedly implicit in being forced to defend its actions before officials of another sovereign.²⁵⁹ In contrast, in the modern sovereign immunity cases, the alleged insult to the state's dignity stems not from the identity or provenance of the adjudicatory authority but from the mire and unseemliness of the litigation process itself.²⁶⁰ As a consequence, the relationship between dignitary harms and sovereignty concerns is reversed.²⁶¹ In the older case, an injury to sovereignty (being made to answer to another sovereign) causes concern about the state's dignity; in the modern cases, an injury to the state's dignity (being dragged through the mire of modern litigation at the whim of a private party) causes concern about the state's sovereignty.

The evidence that the Court's recent sovereign immunity jurisprudence is motivated in large part by the Court's hostility to litigation is hiding in plain sight. Indeed, in many of the cases the Court comes very close to making the point expressly. For example, the key sentence in the dignity jurisprudence (mined from a nineteenth century precedent by *Puerto Rico Aqueduct & Sewer Authority v. Metcalfe & Eddy, Inc.* and repeatedly quoted

257. The Court routinely acknowledges these concerns. See, e.g., *Alden v. Maine*, 527 U.S. 706, 750 (1999) ("Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States."). So too does the academic commentary. See, e.g., Young, *supra* note 235, at 56 ("Immunity protects the state treasury and ensures that state officials, not private litigants or courts, decide which claims merit the allocation of scarce public resources and which do not."). These quotations reflect a point of contact between the Rehnquist Court's new defenses of sovereign immunity and earlier explanations of that doctrine's purpose, as the early rationales relied heavily on "protecting the public fisc." See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) (describing the Eleventh Amendment as a product of the Court's decision to uphold its jurisdiction over claims against "greatly indebted" states).

258. *Cohens*, 19 U.S. (6 Wheat.) at 406–07.

259. See *id.*

260. For some rhetoric drawn from the opinions demonstrating the essence of the argument, see *infra* text accompanying notes 265–268.

261. If, as I suggest, the underlying dignity rationale in the modern cases diverges from the dignity rationale in *Cohens*, one consequence is that the dissenters—and Justice Stevens in particular—are a bit too quick in assuming that history and precedent conclusively reject the majority's approach. Cf. *supra* note 245 (evaluating dissenters' argument regarding *Cohens*).

by later decisions) specifically identifies the relevant “indignity” at issue as “subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”²⁶² That sentence might in the abstract be read as focusing on the special attributes of statehood that make sovereign immunity necessary, but the horrors that it is designed to evoke—the “coercive” nature of court proceedings, the majesty of the “judicial tribunals” that sit in judgment, the fact that nothing more than the insistence of a “private party” is necessary to engage these daunting and coercive institutions—are more universal. It is highly likely that this sentence escaped the dustbin of history and became the launching point for a new normative theory of sovereign immunity precisely because, at some visceral level, it tapped into the same complex of ideas and emotions that have fueled the Court’s other anti-litigation offenses.

As the Court has come to rely more and more on the dignity rationale in recent years, it has ratcheted up its language even further, drawing on our collective cultural anxieties about litigation and the coercive power of the state in order to exact sympathy for a sovereign stripped of its immunity. In *Federal Maritime Commission*, for example, Justice Thomas repeats the standard rhetoric about “subjecting” a state to “coercive process” at the behest of private parties, but also talks openly of preventing a private party from “haul[ing] the State in front of” a judge.²⁶³ Similarly, in *Alden*, Justice Kennedy follows the standard *Ayres* quotation with a new parade of horrors, culminating in the prospect of a state “thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public behalf.”²⁶⁴ The merits of its substance notwithstanding, the tone and psycho-social overtones of this rhetoric are striking. Sovereign immunity is not merely a way to preserve public officials’ time or the public treasury, rather it protects us from a Kafkaesque universe in which the defenseless state is “hailed” into Court or “thrust” by “flat” and “against its will” into “disfavored status” and “subject to the power of private citizens.”²⁶⁵

3. *Substantive Points of Contact with Litigation Hostility.*—The litigation hostility of the Rehnquist Court’s sovereign immunity decisions is

262. E.g., *P.R. Aqueduct & Sewer Auth. v. Metcalfe & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

263. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760, 761 n.11, 760 n.13 (2002).

264. *Alden v. Maine*, 527 U.S. 706, 749 (1999).

265. The irony of the Court’s rhetorical gambit is, of course, that in the sovereign immunity drama the Court is scripting, the roles are reversed from the prototypical Kafkaesque tale. Here, it is the state that is hauled into court against its will on the whim of another and under circumstances portending procedural unfairness and substantive defeat, while the private individual is the powerful agent of judicial oppression and procedural unfairness. Evaluating the legitimacy and persuasiveness of this act of appropriation is, thankfully, beyond the scope of this project.

more than rhetorical. In substance, these decisions are of a piece with the Court's litigation-hostile opinions in the areas surveyed above in several interesting ways. To begin with the most obvious, the sovereign immunity decisions, like those in the right of action, qualified immunity, and arbitration cases,²⁶⁶ have the specific consequence of foreclosing judicial consideration of a substantial number of lawsuits for reasons that have nothing to do with the merits of the litigation.²⁶⁷ Indeed, while some of the decisions pay lip service to alternative remedies,²⁶⁸ the cases—like those in the qualified immunity context—clearly contemplate that there will be a category of citizens who suffer significant injuries as a result of illegal governmental conduct who will be unable to obtain appropriate compensation.²⁶⁹ This principle, implicit in the Court's earlier cases, was driven home in particular by *Alden*, which definitively rejected the theory long held out by many that the sovereign immunity embedded in the Constitution by the Eleventh Amendment does not preclude litigation but only channels it into state courts.²⁷⁰

Puerto Rico Aqueduct—the first case to develop the modern dignity rationale—provides another intriguing point of connection. In that case, the Court allowed for interlocutory appeals of decisions denying motions to dismiss on sovereign immunity grounds with the specific intent of ensuring that more suits are dismissed without trials on the merits.²⁷¹ In reaching that decision, the Court specifically relied upon precedents involving the

266. For discussions of these areas, see *supra* subpart III(A) (remedies and rights of action), section III(B)(1) (qualified immunity), and subpart III(C) (arbitration).

267. See, e.g., *Alden*, 527 U.S. at 754–55 (“The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design.”).

268. See, e.g., *id.* at 755–57 (arguing that states might still be forced to heed federal law and federal rights by suits to which they consent, suits by the United States, suits against officials in their individual capacities, and injunctive suits against officials in their official capacities).

269. The Rehnquist Court's willingness to tolerate laws and procedures that countenance substantial gaps between rights and remedies is a central theme of this piece. Other recent works treat this same theme using some similar and some very dissimilar areas of law. See, e.g., John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (arguing that the rights–remedy gap serves some salutary purposes); Sam Kamin, *Harmless Error and the Rights/Remedy Split*, 88 VA. L. REV. 1 (2002) (discussing qualified immunity, harmless error, and non-retroactivity doctrine from the perspective of the rights–remedy gap and concluding that harmless error, but not the others, presents a substantial problem).

270. See *Alden*, 527 U.S. at 735 (noting, in a statement that pushes the boundaries of plausible understatement, that “[t]here are isolated statements in some of our cases suggesting that the Eleventh Amendment is inapplicable in state courts”); *id.* at 754 (“In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.”).

271. *P. R. Aqueduct & Sewer Auth. v. Metcalfe & Eddy, Inc.*, 506 U.S. 139, 143–45 (1993).

immediate appealability of decisions denying qualified immunity²⁷² and spoke of its decisions in both immunity contexts as attempts to enforce a "privilege not to be sued."²⁷³

Puerto Rico Aqueduct also serves to underscore the more general connection between sovereign immunity and qualified immunity cases. As scholars such as Richard Fallon and Richard Seamon have reminded us, it behooves us not to pigeon-hole the Rehnquist Court's sovereign immunity cases as "federalism" cases.²⁷⁴ While they certainly do speak loudly and persistently to federalism concerns, they are also governmental immunity cases and, as such, bear comparison to the Court's other recent forays into expanding official immunity, most notably its qualified immunity decisions.²⁷⁵ When a litigant injured by governmental action seeks relief, he or she does not encounter sovereign immunity as a discrete "federalism" obstacle but instead faces that doctrine as part of an integrated patchwork of complicated governmental and official immunity doctrines which taken together require extensive litigation planning and careful drafting.²⁷⁶ Though correlation is not causation, the fact that the Court chose to drastically expand these practically and conceptually linked immunity doctrines at the same moment suggests that a common impulse may underlie both developments.

Finally, in several of the other recent sovereign immunity cases, the Court imposed new limitations on the ability of private litigants to seek injunctive relief against the states, limitations designed in large part to channel disputes over important issues of public policy out of the courts and into alternative dispute resolution systems or remedial structures.²⁷⁷ These decisions are in substantial accord with the holdings and rationale of the Court's decisions in the implied private right of action, § 1983, attorney's fees, and punitive damage contexts.²⁷⁸ When given an opportunity to chip

272. See, e.g., *id.* at 143 (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

273. *Id.* at 146 n.5.

274. See Fallon, *supra* note 1, at 464–65, 482–85 (putting recent sovereign immunity decisions into conversation with qualified immunity decisions); Richard H. Seamon, *Damages for Unconstitutional Affirmative Action: An Analysis of the Monetary Claims in Hopwood v. Texas*, 71 TEMP. L. REV. 839 (1998) (sorting through the complicated and overlapping immunity issues in the context of one particularly contentious case).

275. See *supra* section III(B)(1).

276. For the rare academic article that demonstrates the validity of this observation—an observation that is obvious to most civil rights practitioners, see generally Seamon, *supra* note 274.

277. See, e.g., *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287–88 (1997) (holding the *Ex Parte Young* doctrine inapplicable to an action by an Indian tribe and its members against a state seeking declaration of ownership rights in certain lands because allowing the action would strike at the heart of state sovereignty); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73–75 (1996) (holding *Ex Parte Young* relief unavailable in the case at issue because to allow such an action would thwart a "crafted and intricate remedial scheme" developed by Congress).

278. See generally *supra* subpart III(A) (treating the Court's jurisprudence limiting implied private rights of action and noting decline of such actions as a vehicle for enforcing federal law);

away at the policymaking power of courts and litigants, the Rehnquist Court was happy to oblige.

B. *Paths Not Taken*

The Rehnquist Court's hostility to litigation helps explain not only why the Court has chosen to pursue its federalism initiative with vigor in certain areas of the law, but also why it has eschewed opportunities to pursue other plausible state-protective doctrinal paths. In one such area, preemption, the Court's failure to pursue state-protective doctrine has been the subject of substantial criticism, both internal and external.²⁷⁹ In another such area, the right of states to set the rules and procedures of their own courts free from federal interference, the commentary and criticism has been more sporadic.²⁸⁰ This subpart explores the opportunities the friends of a robust federalism have had to develop new doctrines in these two areas, the manner in which they have rejected those opportunities, and the plausibility of hostility to litigation as an explanation for the Court's reluctance to pursue these paths.

1. *Preemption.*—Preemption is by far the most common federalism issue facing the courts. In hundreds, perhaps thousands, of cases every year, judges must determine whether particular state law enactments impermissibly conflict with or hamper the operation of federal law such that they are preempted and thus unenforceable.²⁸¹ In most years, a handful of

section III(B)(2) (explaining that the Court's narrow reading of civil rights attorney's fee statutes has the consequence of reducing the use of private civil rights actions as vehicles for enforcing federal law); subpart III(D) (arguing that the hostility to punitive damages has much to do with the policymaking aspect of such damages).

279. For external sources noting a purported inconsistency between the Rehnquist Court's handling of preemption cases and its other federalism doctrines, see, for example, Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1314 (2004); Fallon, *supra* note 1, at 429–30; Massey, *supra* note 1, at 502–12; Meltzer, *supra* note 1, at 362–78; and Young, *supra* note 13, at 30–32. For the most striking internal criticism, see *Egelhoff v. Egelhoff*, 532 U.S. 141, 153, 160 (2001) (Breyer, J., joined by Stevens, J., dissenting) (“[I]n today’s world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at its edges . . . , or to protect a State’s treasury from a private damages action . . . , but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law . . .”).

280. There is one significant scholarly article on this subject. Bellia, *supra* note 13. The cases that have presented opportunities in this area have been the subject of scattered constitutional commentary, though most serious study of those cases has focused primarily or exclusively on other constitutional issues. See, e.g., Lynn A. Baker, *Lochner’s Legacy for Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. REV. 727 (2005) (focusing on Commerce Clause and Spending Clause issues); Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487 (2004) (focusing on Commerce Clause issue); Garnett, *supra* note 11, at 5 n.23 (commenting on the unresolved Spending Clause issue in *Guillen*).

281. To crudely illustrate this point, a search for the term “preemption” in Westlaw’s “ALLCASES” database of cases decided between December 22, 2003 and December 21, 2004 reveals 1452 cases that use the term. The great bulk (but not all) of those cases involve at least

these cases cause such consternation and conflict that they make their way to the Supreme Court.²⁸²

One might expect a Court committed to protecting state autonomy and limiting federal regulatory authority to be sympathetic to arguments that state laws should not easily be overridden by federal laws, at least absent clear evidence of Congress's desire to preempt state regulation. While the Rehnquist Court has, at times, endorsed just such a "presumption against preemption" in words,²⁸³ it has consistently rejected such an approach in practice. In cases dealing with a wide cross-section of regulatory arenas, the Justices have overwhelmingly sided with those advocating the invalidation of state regulation and against their erstwhile allies, the states.²⁸⁴ Though the numbers have leveled off a bit in the last few terms,²⁸⁵ for much of its time together, the Rehnquist Court was finding preemption in over two-thirds of the cases raising the issue.²⁸⁶ During the 1999 and 2000 terms, the Court did itself one better and found preemption in every single case raising the issue (seven out of seven).²⁸⁷

tangential preemption issues. Of course, not all cases that raised preemption issues resulted in written opinions discussing the issue by name.

282. By my count, the Supreme Court decided two preemption cases during October Term 2004; three during October Term 2003; six during October Term 2002; five during October Term 2001; three during October Term 2000; and six during October Term 1999, for a total of 25 in the last six years. Because of the difficulty of classifying peripheral cases, these numbers do not necessarily match the calculations of other academics cited herein. At minimum, however, these numbers give an accurate portrayal of the scale of such litigation.

283. See, e.g., *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997) (referring to the "normal presumption against pre-emption"); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("[W]e must construe these provisions in light of the presumption against the pre-emption of state police power regulations.").

284. A list of such cases would be long and pointless. For one scholar among many who notes this trend, see Young, *supra* note 13, at 30. For quantification of this claim, see the text immediately following this note and accompanying notes.

285. During its last term, the Supreme Court considered only two preemption claims and rejected them both. See *Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm'n*, 125 S. Ct. 2427 (2005); *Bates v. Dow Agrosciences, LLC*, 125 S. Ct. 1788 (2005). During the previous term, the Court only accepted one out of three such claims. See *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (preemption found); *Engine Mfrs. Ass'n v. S. Coast Air Mgmt. Quality Dist.*, 541 U.S. 246 (2004) (no preemption); *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (no preemption). Whether these cases reflect a shift in the Court's approach—perhaps prompted by the carping of friends of the Court's federalism—or merely reflect the fact that some lower courts are now finding preemption in outlandish situations is an open (and perhaps unanswerable) question. However, it is worth noting that some commentators familiar with these cases argue that, while the Rehnquist Court has been pro-preemption, it has not been as aggressively committed to a broad preemption doctrine as some of the circuit courts. To the extent the Rehnquist Court has had to temper the enthusiasm of the lower courts for doctrines it itself created, the dynamic in preemption cases is similar to the one operating in qualified immunity cases. See *supra* text accompanying notes 139–141.

286. See Fallon, *supra* note 1, at 462 & n.221 (noting findings of preemption in twenty-two out of thirty-five cases decided between fall of 1991 and spring of 2001); Meltzer, *supra* note 62, at 369 (same).

287. See Fallon, *supra* note 1, at 462–63 & n.222 (making the point and listing the cases).

Moreover, the Court's unwillingness to loosen the grip of preemption has been driven almost entirely by the same set of Justices who have in other contexts been the champions of state autonomy. Though the alliances have been somewhat more fluid in the preemption context than in the sovereign immunity context,²⁸⁸ the usual defenders of states' rights (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) have tended to find themselves in the pro-preemption majority with their usually more nationalist colleagues in dissent.²⁸⁹ Justice Stevens has been the most consistent vote against broad preemption,²⁹⁰ while he and Justice Breyer have authored the sharpest attacks on the majority's approach. In general, their dissents have not been shy to accuse the majority of inconsistency and even hypocrisy for its unwillingness, in this context, to accord the states broad latitude to legislate.²⁹¹

Though many factors undoubtedly contribute to the Rehnquist Court's determination to embrace a potent form of preemption despite that doctrine's adverse consequences for the autonomy of the states,²⁹² most commentators

288. See, e.g., *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 354–55 (2001) (Stevens, J., joined by Thomas, J., concurring in the judgment) (expressing a much narrower view of implied preemption than that adopted by the other Justices). See also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (delineating the relationship between implied and express preemption in the context of common law actions; Justice Breyer finding preemption and writing the majority opinion; Justice Thomas dissenting with the three remaining liberals).

289. One scholar has calculated that during the 1999–2001 terms, the Court decided twelve preemption cases on the merits and that in those cases the four more liberal Justices (Stevens, Souter, Ginsburg, and Breyer) voted for preemption between three and five times, while the five more conservative Justices voted for preemption between nine and eleven times. See Meltzer, *supra* note 62, at 370 n.117 (providing case-by-case table).

290. See *id.* (noting that Justice Stevens voted for preemption only three times during the 1999–2001 terms).

291. See, e.g., *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., joined by Stevens, J., dissenting) (“[I]n today’s world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at its edges . . . , or to protect a State’s treasury from a private damages action . . . , but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law”) (internal citations omitted); *Geier*, 529 U.S. at 887 (Stevens, J., dissenting) (“‘This is a case about federalism,’ that is, about respect for ‘the constitutional role of the States as sovereign entities.’ It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions.” (citations omitted)).

292. Some commentators have argued that the Court’s failure to apply a broad presumption against preemption on federalism grounds is an accurate and principled reading of the relevant history and doctrine. See, e.g., Dinh, *supra* note 13, at 2088 (arguing that “resort to the constitutional structure of federalism does not support a general, systematic presumption against preemption”); Nelson, *supra* note 13, at 290–303 (noting that the characterization of the Supremacy Clause as a *non obstante* provision undermines the recognition of a general presumption against state law preemption). Others, to the contrary, trace the Court’s failure to embrace such a rule as a failure of will or imagination, suggesting that if the Court fully understood both its own normative vision and the federalism consequences of loosening preemption’s reins, the Court would turn course. See, e.g., Massey, *supra* note 1, at 502–12. Still others see the seeming incongruity of the Court’s actions in the preemption areas as a product of the Court’s larger ideological commitments, rather than issue-specific merits considerations or judicial oversight. See, e.g., Young, *supra* note

appropriately center their explanation on the anti-regulatory implications of the contemporary doctrine.²⁹³ As others have noted, what most of the modern preemption cases have in common is that they challenge a restriction or requirement imposed on business or commerce by state or local government.²⁹⁴ Though it is theoretically possible to pose preemption problems where a state is seeking to permit an activity arguably prohibited by federal law, in modern practice the vast majority of close or important preemption cases instead pose the opposite problem: state law seeks to impose a second level of regulation or liability on top of a federal regulatory scheme and the parties vigorously dispute whether the federal scheme either expressly or impliedly authorized the conduct it did not prohibit.²⁹⁵ Faced often enough with this recurring situation, Justices whose inclinations lean towards less aggregate regulation might well embrace a firmer preemption doctrine, abstract concerns for state autonomy notwithstanding, particularly if—as is the case here—the preexisting precedents and underlying constitutional structures offer significant support for their position.²⁹⁶

The generalized hostility to regulation that runs through the Rehnquist Court's preemption jurisprudence is supplemented and reinforced by a more particularized hostility to litigation that by now ought to be familiar. A striking number of the most significant preemption cases of the last decade involve claims that federal law expressly or impliedly preempts state common law causes of action, and the Court has been even more likely to find preemption in these cases than in any cases that involve potential conflicts between federal law and state statutes or administrative determinations.²⁹⁷ To take just a few examples, the Rehnquist Court has

13 (arguing that the majority Justices' embrace of preemption reflects an approach to federalism characterized by respect for the states' "dignity" rather than their "autonomy").

293. See, e.g., Cross, *supra* note 11, at 1310; Fallon, *supra* note 1, at 471–72.

294. See, e.g., Staab, *supra* note 13 (discussing the Rehnquist Court's use of preemption doctrine to invalidate commercial restrictions enacted by state governments with respect to products liability).

295. This general description applies with equal force to the kind of tort cases discussed *infra* text accompanying notes 298–305 and the more common challenge to a direct state regulatory action. See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (involving regulations promulgated by the Massachusetts Attorney General); United States v. Locke, 529 U.S. 89 (2000) (involving regulations adopted by a Washington administrative agency at the direction of its legislature).

296. See generally Nelson, *supra* note 13 (arguing with considerable persuasiveness that federalism does not require and history does not support a presumption against preemption); Dinh, *supra* note 13 (arguing similarly).

297. Though the sample sizes are sufficiently small to be coincidence, the Court has in recent years been much more likely to find a state tort claim (or a similar state common law lawsuit) preempted than a general state regulatory provision. In the last two terms, for example, the Court found preemption in only one case and it was one of the two cases involving a state tort action. See *supra* note 285 (listing and discussing cases from the last two terms). In the last nine terms, the Court has found preemption in every case raising a challenge to state common law tort provisions save two: *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005), and *Spietsma v. Mercury Marine*, 537

invalidated decisions relying on state tort law that would have permitted lawsuits seeking compensation from HMOs for violation of their “duty of care” to their policyholders,²⁹⁸ from manufacturers of faulty medical devices for using fraud to obtain approval of the devices,²⁹⁹ from car manufacturers for failing to install optimal safety devices,³⁰⁰ and from cigarette manufacturers for failing to warn about the consequences of smoking.³⁰¹ In these cases, the Court’s overarching concern over the appropriate volume of regulation is augmented by additional anxiety prompted by the identity of the state regulator. Like in other areas surveyed above, particularly punitive damages,³⁰² the Court finds something particularly disquieting about the power that litigation gives judges and private parties to shape social policy goals and the rules of appropriate corporate conduct.

In ways that continue to track the other topics surveyed, the preemption decisions reveal the degree to which such institutional concerns are joined in the Court’s under-theorized hostility to litigation with more specific disgruntlement towards the substance of our modern litigation culture. In case after case, the Court is confronted with a creative team of plaintiffs’ lawyers seeking to obtain substantial damages under a cutting-edge theory of liability, often after simpler paths to recovery have been found preempted or unsupportable.³⁰³ In such cases in particular, the authority to declare state

U.S. 51 (2002). For an argument that *Sprietsma* is, in a broad sense, a pro-preemption decision, see *infra* note 300.

298. *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (finding a Texas tort law claim expressly preempted by ERISA).

299. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001) (finding a class of Pennsylvania tort claims impliedly preempted by the regulatory scheme established by the Food, Drug and Cosmetic Act, the Medical Devices Amendments, and the FDA’s regulatory policies). *But cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (finding that longstanding state common law torts that do little more than supplement the same regulatory scheme are not expressly preempted).

300. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding a District of Columbia tort law claim impliedly preempted by Department of Transportation safety standards even after concluding that the claim was not expressly preempted by the National Traffic and Motor Vehicle Safety Act); *cf. Sprietsma*, 537 U.S. 51 (2002) (agreeing with *Geier* that promulgation of federal safety statutes might impliedly preempt common law actions for failure to install additional safety devices even when the relevant express preemption provision is limited to statutory law, but concluding on the facts that the safety standards promulgated in this instance were not intended to be exclusive). *Sprietsma* is generally in accord with the Court’s anti-litigation preemption jurisprudence, but marks off the limits of that jurisprudence by rejecting the view—seemingly adopted by some lower courts—that the mere existence of federal safety standards necessarily invalidates state common law actions to enforce stricter standards. For my acknowledgment of the possibility that the recent uptick in cases where the Court has rejected preemption claims might reflect the fact that the lower courts are now outpacing the Supreme Court in their embrace of preemption, see *supra* note 285.

301. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). *Cipollone* is a complicated decision that found only some of the relevant state law claims preempted and reached different results about even those claims for different periods based on shifting express preemption provisions in the relevant federal statute.

302. See *supra* subpart III(D).

303. See, e.g., *Buckman*, 531 U.S. at 343 (finding fraudulent representation claims made under state law to be preempted by federal law); *Cipollone*, 505 U.S. at 508–12 (finding some contract

law tort remedies preempted is a potent weapon and a substantial temptation to those who genuinely believe our current tort regime to be out of control. Recognizing this reality, Justice Stevens has chided his colleagues to remember that “the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States.”³⁰⁴ Though the substantive issues are different and the lineups are interestingly intermingled, the similarity between the dissents’ lament in the tort preemption and punitive damage areas is striking.³⁰⁵

The interrelationship of the Court’s generalized hostility to regulation and its even more pronounced distaste for the use of litigation as an engine of regulatory policy is unclear. More likely than not, the Court’s special skepticism about the legitimacy of state courts’ attempts to regulate behavior through common law rules is just a more intense variation of the anti-regulation impulse that dominates the preemption decisions, ratcheted up a notch by the Court’s hostility to litigation but not fundamentally altered. On the other hand, there is at least some possibility that the anti-regulation bent of the Rehnquist Court’s broader preemption jurisprudence itself stems from the Court’s hostility to litigation. Given the centrality of the litigation cases to the Court’s preemption jurisprudence and the deeper intensity that such cases have tended to engender, there is some chance that, when thinking about and forming their reactions to preemption in the abstract, the Justices conceptualize a challenge to a state common law tort action as the *ür*-case, the prototypical dispute. If that is the case—a possibility but far from a certainty—then litigation hostility has played a central role in shaping the distribution of regulatory authority in the American polity. Even if it is not, litigation hostility remains part of the story, sharpening the Court’s antipathy to regulation in a noticeable subset of preemption cases and, in so doing, pushing the Court’s general preemption jurisprudence in a more expansive direction.

2. *The Independent Authority of the Courts to Set Their Own Procedures.*—Though preemption is the most commented-upon area in which the Court has declined to pursue an available doctrinal avenue that would have further protected the authority or autonomy of the states, it is far

claims based on fraudulent misrepresentation to be preempted by federal law); *cf. Aetna*, 542 U.S. at 221 (finding that a statutory tort right asserted to evade denial of benefits under ERISA was preempted).

304. *Geier*, 529 U.S. at 894 (Stevens, J., dissenting); *cf. Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 360 (2000) (Ginsburg, J., dissenting) (complaining with regard to the decision in a railroad crossing case that “[t]he upshot of the Court’s decision is that state negligence law is displaced with no substantive federal standard of conduct to fill the void”).

305. *See supra* note 211 and accompanying text. Both sets of cases involve majorities reading particular constitutional provisions in ways that clamp down on the availability of tort remedies and dissenters who, while broadly sympathetic to that agenda, cannot swallow the requisite constitutional analysis.

from the only one.³⁰⁶ Take, for example, the power of state courts to set their own rules and procedures.³⁰⁷ While there is little if any preexisting jurisprudence that treats this power as constitutionally protected,³⁰⁸ there are many reasons to suspect that the issue might be of interest to the pro-federalism Justices on the Rehnquist Court. First, on the single issue of sovereign immunity, the Justices have already relied on general structural principles to protect the authority of state courts to establish their own rules.³⁰⁹ Second, the current Justices have developed—from an equally blank slate—parallel doctrines that protect the autonomous decisionmaking authority of state legislators and executive officials from federal encroachment.³¹⁰ Third, the Court's more general federalism jurisprudence has focused on protecting the dignity of the states and respecting our unique system in which the states retain a meaningful sovereignty,³¹¹ values that are hard to mesh with the image of one sovereign micro-managing key institutions of the other. Finally, recent decades have seen a steady stream of federal legislation mandating and prohibiting certain procedures in state courts, a relatively new development that arguably undermines a tacit understanding about the appropriate exercise of federal power.³¹²

306. Many opponents of the Court's federalism initiative have noted this fact as part of an argument that the Court's real motivation is some form of substantive conservatism. *See, e.g.,* Colker & Scott, *supra* note 1, at 1370–72; Cross, *supra* note 11, at 1306–13; Fallon, *supra* note 1, at 429. Friends of the Court's federalism have done the same in an effort to encourage it to push further. *See, e.g.,* Baker, *supra* note 280, at 751–63 (discussing the Spending Clause); Garnett, *supra* note 11, at 34–38 (discussing criminal law federalism).

307. The path that the Court might (have?) tread in this area is mapped out in Professor Bellia's elegant *Yale Law Journal* article. Bellia, *supra* note 13; *see also id.* at 951 n.14 (enumerating preexisting literature on the issue); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OR. L. REV. 541, 547–70 (2004) (discussing these issues deftly in the context of Federal Arbitration Act case law). While I recommend this literature, I do not engage it, as the merits of this federalism argument are outside the purview of this Article.

308. On the other hand, there is a slight body of law to the contrary, most notably *Testa v. Katt*, 330 U.S. 386, 391–94 (1947), and its progeny, which hold that Congress may as a general inatter require state courts to hear federal law claims. These cases (and others imposing similar requirements) provide some authority for a general federal right to determine state court procedures if doing so serves a legitimate federal interest; however, these cases could be distinguished if the Court were interested in pursuing this line of inquiry. In particular, the relevant precedents deal almost exclusively with rules imposed in state courts in federal law cases, leaving open whether such a power extends to routine state law cases. *But see* Schwartz, *supra* note 307 (arguing that the Constitution prohibits many kinds of interference, even in federal law cases).

309. *See Alden v. Maine*, 527 U.S. 706 (1999) (holding that, with limited exceptions, constitutional structure precludes Congress from requiring states to waive their sovereign immunity in their own courts).

310. *See Printz v. United States*, 521 U.S. 898 (1997) (prohibiting the federal government from "commandeering" state and local executive officers to enforce federal law); *New York v. United States*, 505 U.S. 144 (1992) (prohibiting the federal government from "commandeering" state legislatures).

311. *See supra* subpart IV(A) (discussing the Rehnquist Court's sovereign immunity jurisprudence and its focus on the dignity of states).

312. *See, e.g.,* Bellia, *supra* note 13, at 953–63 (discussing this trend).

These indicia of potential interest notwithstanding, the Court has been largely indifferent to the issue of state court autonomy. In a number of recent cases, the Court has been presented with opportunities to articulate limits on the power of the federal government to regulate state courts' structure, procedure, or rules.³¹³ In particular, two cases decided early in 2003 provided plausible opportunities for the Court to develop and employ such limits if it were so inclined.³¹⁴ At a minimum, the cases presented the Court with appropriate vehicles to discuss the relationship between Congress and the state courts and explain the implications of that relationship for Congress's power. In both cases, however, the Court declined to address the issue in any substantive way. In the first case, the Court declined to reach the issue because it was not addressed by the lower court,³¹⁵ while in the other it raised the question in a general way but dismissed its relevance in a single, largely unreasoned paragraph.³¹⁶

The first case, *Pierce County v. Guillen*,³¹⁷ involved a federal statute prohibiting the discovery or admission as evidence in "a Federal or State court proceeding" of most reports or data prepared to assess the safety of roads and intersections.³¹⁸ The Washington Supreme Court had struck the statute down as exceeding Congress's enumerated powers,³¹⁹ but the United States Supreme Court unanimously reversed in a decision by Justice Thomas, holding that the provision was "legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce" and was thus within Congress's Commerce Clause power.³²⁰ Justice Thomas's very brief discussion of the constitutional issues in this case mentions only in a footnote the fact that the statute seeks to regulate the rules of discovery and evidence in state courtrooms and contains no more general discussion of the fact that the statute directly regulates legal proceedings rather than roads or vehicles.³²¹ In the relevant footnote, the

313. Cases that might be implicated by a rule protecting the autonomy of the state courts are surprisingly frequent and diverse. One area where the question comes up repeatedly is the Court's application of the Federal Arbitration Act to the states. See generally Schwartz, *supra* note 307; *supra* subpart III(C).

314. *Jinks v. Richland County*, 538 U.S. 456 (2003); *Pierce County v. Guillen*, 537 U.S. 129 (2003).

315. *Guillen*, 537 U.S. at 148 n.10.

316. *Jinks*, 538 U.S. at 464–65 ("Assuming for the sake of argument that a principled dichotomy can be drawn, for purposes of determining whether an Act of Congress is 'proper,' between federal laws that regulate state-court 'procedure' and laws that change the 'substance' of state-law rights of action, we do not think that state-law limitations periods fall into the category of 'procedure' immune from congressional regulation.").

317. 537 U.S. 129 (2003).

318. 23 U.S.C. § 409 (2000).

319. *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 2001).

320. *Pierce County v. Guillen*, 537 U.S. at 147. Since the Court found the statute within Congress's Commerce Clause power, it did not address whether it is also an acceptable exercise of Congress's Spending Clause Power. See *id.* at 147 n.9.

321. *Id.* at 148 n.10 (noting issue of regulation of state court rules).

Court declines to address whether the statute unconstitutionally interferes with the autonomy of the state courts on the ground that the issue was not decided by the lower court.³²²

The second case, *Jinks v. Richland County*,³²³ involved the tolling provision of the federal supplemental jurisdiction statute.³²⁴ Under that provision, in an action filed in federal court alleging federal law claims and pendent state law claims, the state statute of limitations is automatically tolled while the case is in federal court and for thirty days afterward, such that, if the federal court ultimately dismisses the case without ruling on the merits of the state claim the plaintiff will have at least thirty days to file in state court.³²⁵ In assessing whether the statute could constitutionally be applied in an action against a municipality, the Court seriously considered two claims: whether the provision fell within Congress's enumerated powers, and whether any special federalism concerns precluded the application of the statute when the defendant was a non-consenting municipality who otherwise could take advantage of a limited grant of sovereign immunity under state law.³²⁶ Determining without much trouble that the statute was valid legislation under Congress's authority to establish and administer the federal courts and that the Constitution did not recognize any form of sovereign immunity for a municipality, the Court unanimously upheld the statute.³²⁷

The Court acknowledged that the decision imposed rules on federal courts and noted in passing that some have objected on constitutional grounds to federal legislation that interferes with the internal operations of state courts.³²⁸ However, Justice Scalia, writing for the Court, quickly dismissed the applicability of the doctrine to this case.³²⁹ His move was deft but not particularly analytical, classifying the objection as concerning only "procedural" rules and then entering into an arcane and relatively unreasoned

322. See *id.* The Court's invocation of this prudential principle was somewhat strained in this case, particularly as the Court has routinely treated the state autonomy–anticommandeering issue as part and parcel of whether a statute falls within Congress's powers, rather than as a separate Tenth Amendment inquiry. See, e.g., *Jinks v. Richland County*, 538 U.S. 456, 464 (2003); *Printz v. United States*, 521 U.S. 898, 923–24 (1997).

323. 538 U.S. 456 (2003).

324. 28 U.S.C. § 1367(d) (2000).

325. In a 2002 case that relied heavily on the state's sovereign immunity from the initial lawsuit in federal court, the Supreme Court held that the tolling provision did not act to save a claim filed against a non-consenting state that would be time-barred under applicable state law. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002). *Jinks* involved the next question—whether federalism concerns precluded the application of the statute to municipalities. If the Court had found for the county, the constitutionality of the statute when applied to litigation involving only private parties might or might not have been endangered depending on the Court's rationale.

326. *Jinks*, 538 U.S. at 462–63 (enumerated powers question); *id.* at 465–67 (sovereign immunity question).

327. *Id.* at 467.

328. *Id.* at 464–65.

329. *Id.* at 465.

discussion of whether the tolling provision in this case was “substantive” or “procedural,” ultimately concluding that it was substantive.³³⁰

Taken together and in conjunction with others like them, these cases seem to suggest that the Rehnquist Court had no real interest in establishing rules protective of state court autonomy or even in clarifying the constitutional relationship between the federal governments and the state courts. With regard to the usual federalism dissenters, this causes no surprise; for them the argument was likely frivolous.³³¹ For the *Printz v. United States* and *Alden* majority, however, it requires some explanation. While the answer to why they—and with them the Rehnquist Court—eschewed this path is likely complex and multivariate, their hostility to litigation likely played some part.

At first blush, that proposition might seem counter-intuitive, as *Jinks* upheld a congressional statute that was purposefully pro-litigation.³³² To treat the decision as pro-litigation for that reason, however, represents a failure to see the forest for the trees. It has been one of the central assumptions of this Article that Justices do not encounter cases as discrete disputes but instead come to them with all sorts of inchoate or under-theorized assumptions about law, culture, and human nature. If, for whatever reason, the Justices subscribe—either intellectually or viscerally—to the assumption that judicial federalism is litigation-positive, then, for the reasons demonstrated throughout this Article, their natural indication will be to shy away from doctrines that promote this aspect of federalism. While this inclination might be overcome in particular cases by the starkly pro-litigation consequences of a given decision or by some countervailing element of their complex, intellectual matrices, they will approach claims about the sanctity of state court procedures with more skepticism and reluctance than other, broadly anti-litigation, federalism initiatives.

330. *Id.* Since, as Justice Scalia acknowledges, *id.* at 465, statutes of limitations are treated alternatively as substantive and procedural depending on the purpose for which the Court is drawing the distinction, it was incumbent on him to explain what “procedural” meant in the context of this possible constitutional objection before he could dismiss the claim on the basis of the substance-procedure distinction. Doing so, however, would have necessitated explaining in some detail how the Court conceptualized the potential constitutional challenge and perhaps even evaluating its strength. For some reason (or likely combination of reasons), the Justices were unwilling to do so.

331. *Cf. Printz v. United States*, 521 U.S. 898, 968–70 (1997) (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting) (arguing that *Testa* and its progeny refute anti-commandeering arguments even with regard to executive officers).

332. The tolling clause at issue in *Jinks* serves primarily to ensure that litigants with credible state law claims do not lose their day in court merely because of a discretionary decision by a federal court judge not to retain jurisdiction of the case. 538 U.S. at 463–64 (explaining that when both federal- and state-law claims are asserted in federal and state court, any state-law claims “will not become time barred [and run the risk of being dismissed] while pending in federal court”). *Guillen*, in contrast, did reach a litigation-hostile result, in that the discovery and admissibility rules at issue remove a potentially useful source of evidence for tort plaintiffs. 537 U.S. at 731–32 (holding as constitutional and within Congress’s power a statute preventing a plaintiff’s attempt at discovery and admission of evidence of a state’s highway reports and surveys that the state pursued for the purpose of elimination of roadway hazards).

The current political climate suggests that this argument is descriptive as well as theoretical. As the Justices well know, in contemporaneous political debates, particularly the ongoing debate over tort reform, judicial federalism is seen as a friend to litigation and a foe to reform.³³³ In part, this perception may be the result of nominal factors in our modern litigation culture which make state courts more hospitable to personal injury claims than federal courts at the present time. On the other hand, there is also a more fundamental connection between judicial federalism and litigation hospitality. To the extent that our system continues to allow plaintiffs the right to choose where to file their lawsuits, they will benefit from the availability of a diverse set of forums with different rules and procedures.³³⁴ While class action rules and venue provisions might be tightened to reduce the effects of such forum shopping,³³⁵ no change short of stripping the right of plaintiffs to initiate their own action will entirely eliminate this effect. Moreover, even if this forum-shopping effect were eliminated entirely, states that adopt litigation-friendly rules and procedures that either directly or indirectly subject nationwide businesses to substantially greater liability than they would face in other jurisdictions will continue to have a disproportionate effect on the policies and behavior of those businesses.³³⁶

The Justices need not have thought through these theoretical arguments themselves to have imbibed the policy community's general understanding that judicial federalism is conducive to extensive litigation and substantial tort liability. If, as is likely, they have absorbed that correlation into either their conscious or unconscious understanding of the way in which the world is structured, their litigation hostility might well predispose them to view constitutional claims like those raised in this section skeptically. At a minimum, pro-federalism but litigation-hostile judges are likely to move cautiously in this area, waiting for a case that starkly and inescapably forces

333. Questions of federalism emerge in the battle over every significant tort reform proposal introduced in Congress. For one important recent tort reform statute that specifically relies on federal displacement of state courts in order to limit litigation, see the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(2)(A) (codified as note to 28 U.S.C. § 1711), which both federalized most state court class actions by permitting federal court jurisdiction in class actions that have only minimal diversity and liberalized removal rules.

334. Of course, plaintiffs are not the only parties who can and do "shop" for hospitable forums. See generally Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998) (demonstrating that civil defendants have a particularly high rate of success on the merits when they remove diversity cases to federal courts and arguing that much of this difference survives attempts to account for potential explanations other than the favorability of the forum).

335. See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

336. This issue is specifically discussed by Congress in the text of the Class Action Fairness Act. See *id.*

them to choose between those strands of their jurisprudence.³³⁷ That, of course, is exactly what the “federalist five” have done.

V. Reading *Bush v. Gore* Through the Prism of Litigation Hostility

From a sociological perspective, the case of *Bush v. Gore* was a controversial modern Supreme Court case on steroids. Like other recent high profile cases, the case produced multiple and fractured writings from a set of Justices determined to record their views.³³⁸ Its opinions were filled with contentious rhetoric that revealed fissures and animosities that appeared to transcend the case at hand. The opinions of the Justices were rapidly digested and repackaged for popular consumption by a horde of legally sophisticated and ideologically committed court-watchers of varying stripes. The decision let loose a cavalcade of academic commentary so mammoth that insightful analyses were lost in a fog of noise and partisanship.³³⁹

However, on a more substantive level, it is not clear whether the case truly is emblematic of the Rehnquist Court. While many scholars have sought to claim this memorable and momentous decision as evidence for their own broader analysis of the Rehnquist Court, others have treated the case as an anomaly—a once-in-a-lifetime event produced by an extraordinary set of circumstances and signaling little about the legacy or direction of the Court.³⁴⁰ The Court’s own language gives some support to this reading,³⁴¹ as does the seeming incongruity between the majority’s resolution of the case and its demonstrated fondness for federalist rhetoric and results.³⁴²

337. To frame this concern more concretely, they do not want to state a general theory in a relatively low-stakes case only to discover that they have effectively prejudged (and doomed) the constitutionality of major tort reform legislation.

338. See *Bush v. Gore*, 531 U.S. 98 (2000) (consisting of a per curiam opinion and five additional signed opinions).

339. For one attempt to categorize the scholarship on the case, see Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI., June 2004, at 297. For one particularly insightful examination of the Court’s behavior, see David A. Strauss, *Bush v. Gore: What Were They Thinking?*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT 184 (Richard A. Epstein & Cass R. Sunstein eds., 2001). For an interesting attempt to link the Court’s reasoning to broader trends in the Court’s jurisprudence (which has been lost in the fog), see Mary Anne Case, *Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of Bush v. Gore as a Chapter in the History of Ideas About Law*, 70 U. CHI. L. REV. 55 (2003).

340. Compare, e.g., Kramer, *supra* note 1 (reading *Bush v. Gore* as representative of the Court’s embrace of judicial supremacy), with Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001) (reading the case as an extraordinary incident requiring an extraordinary response).

341. See *Bush v. Gore*, 531 U.S. at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

342. Many commentators have noted this disconnect. For example, Jack Balkin observes: The same five conservative Justices who formed the majority in *Bush v. Gore* had been engaged, for over a decade, in a veritable revolution in constitutional doctrines concerning civil rights and federalism. In those decisions, the five conservatives had been promoting a relatively consistent set of ideological positions like colorblindness,

Anyone who wades into the thicket of situating *Bush v. Gore* in the jurisprudence of the Rehnquist Court is faced with two immense burdens of persuasion: establishing that this mountain of a case has something to say about the molehills of the Court's jurisprudence and suggesting a plausible reading of the case that has not been exhausted by the gallons of ink scholars have already expended on the subject. This section attempts the task of meeting those burdens. Part A offers a narrative of the election controversy that, I believe, best explains both the quandary facing the country and the Court's point of entry into the debate. Part B provides a brief explanation for the extraordinary animosity the Supreme Court displayed for the seemingly routine actions of the Florida Supreme Court. Finally, Part C demonstrates how an explanation of the Supreme Court's behavior that focuses on the majority Justices' skepticism about the ability of courts to resolve disputes and collectively administer justice explains many facets of the Court's various opinions that have appeared opaque or anomalous.

A. *Narrating the Controversy*³⁴³

The results of the 2000 presidential election laid bare the dirty little secret of American democracy: The results so confidently reported after an election are nothing more than an accurate poll of voters' expressed preferences. On the one hand, this is the inevitable result of human frailties on the part of both voters and election officials and the need to calculate and report the results with relative dispatch. On the other hand, the transparency with which the preferences of voters are translated into reported vote totals ebbs and flows based on issues of election administration, ballot design, and voting technology.³⁴⁴ Because reported vote totals are only a close

respect for state autonomy from federal interference, and protection of state governmental processes from federal supervision. But the decision in *Bush v. Gore* did not seem to further those values, at least not directly. Rather, the five conservatives seemed to adopt whatever legal arguments would further the election of the Republican candidate, George W. Bush.

Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408–09 (2001).

343. To understand the *Bush v. Gore* decision, one must first understand the events that brought the case to the doorstep of the Supreme Court. That presents enormous pitfalls, as there are innumerable ways to describe and situate the conflict the Court resolved in *Bush v. Gore*—all with enormous ramifications for evaluating the merits not only of the legal case but also of the behavior of the relevant parties during the controversy. Acknowledging that the narrative described below—like that offered by other scholars—is open to contestation on any number of points, the depiction of the controversy that follows is both descriptive and predictive. It lays out the salient details of the controversy as I predict the history books will eventually come to describe the aftermath of the presidential election of 2000.

344. One of the many notable things about the 2000 election in Florida was that the state and local officials manifestly failed to take appropriate preventive action to reduce the margin of error. To the contrary, their administrative practices, ballot designs, and choices of voting technology combined to produce a robust margin of error. See, e.g., *Bush v. Gore*, 531 U.S. at 134 (Souter, J., dissenting) (“[A] different order of disparity obtains under rules for determining a voter’s intent that have been applied . . . to identical types of ballots used in identical brands of machines and

approximation of voters' actual preferences, elections, like polls, have margins of error. Occasionally, the results of an election will fall within that margin of error. In 2000, the balloting to select Florida's presidential electors was such an election. Because of the confluence of the indecisive Florida results with the outcome in other states, so too was the presidential election. While the circumstances in Florida were rare, they were far from unique. In any given election cycle, a small but significant number of races will fall within the margin of error. These races will produce results so close that there is no way to be certain that the candidate who is reported to have received the largest number of votes is actually the candidate who was preferred by the largest number of voters.³⁴⁵

When an election falls within the margin of error, there are two broad options for certifying elections from which states can choose, each with its advantages and its disadvantages. First, the state can stick to its normal procedures for producing the initial results and declare the winner under that procedure the winner of the election, perhaps after brief and relatively cursory rechecking or recounting procedures to make sure that no obvious computational or reporting error was made. Alternatively, the state can develop ad hoc procedures, tailored to the specific dispute and designed to determine to the greatest extent possible the intent of every voter, aggregating those results so as to get a better guess as to the preference of the electorate. Because of the division of labor in the modern American polity, the second option usually requires—either in the first instance or later on down the path—the supervision and approval of a court acting in an

exhibiting identical physical characteristics.”); Kenneth Chang, *From Ballots to Cockpits, Questions of Design*, N.Y. TIMES, Jan. 23, 2001, at F1 (discussing design problems in ballots used in the 2000 presidential election); Ford Fessenden, *Contesting the Vote: The Voting Machines; No-Vote Rates Higher in Punch Card Count*, N.Y. TIMES, Dec. 1, 2000, at A29 (noting comparative failure rates of punch-card and optical-scan machines); Rick Weiss, *Canadian Study Calls Butterfly Ballot ‘Confusing’*, WASH. POST, Nov. 30, 2000, at A22 (reporting on problems associated with the butterfly ballots used in the presidential election); Joanne Mariner, *Not Everyone Counts: Florida’s 436,900 Missing Votes*, FINDLAW, Nov. 11, 2000, <http://writ.news.findlaw.com/mariner/20001130.html> (criticizing Florida’s permanent disallowance of voting rights to ex-felons).

345. Most of the significant election law precedents cited during the *Bush v. Gore* controversy involved such an election. See, e.g., Pullen v. Mulligan, 561 N.E.2d 585, 588–90 (Ill. 1990) (relating to an election with margin of victory of 31 votes); Delahunt v. Johnston, 671 N.E.2d 1241, 1241 (Mass. 1996) (relating to an election with margin of victory of 175 votes). Nor is this an archaic problem; the volume of elections falling within the margin of error is, if anything, expanding. Washington State’s 2004 gubernatorial election, for instance, fell within the margin of error and ended up in court. See Ralph Thomas, *Gregoire Declared Governor-elect, but Rossi Wants New Election*, SEATTLE TIMES, Dec. 30, 2004, at A1 (reporting results of final recount in Washington gubernatorial election, in which the candidate who originally trailed now led by 129 votes). It is worth noting that several other states seemingly fell within the margin of error in the 2000 presidential election, including New Mexico (0.06%), Wisconsin (0.20%), Iowa (0.32%), and Oregon (0.45%). Bill Briggs, Professor of Mathematics, University of Colorado at Denver, *Aftermath(ematics) of Election 2000* (Dec. 2000), http://www-unath.cudenver.edu/~wbriggs/qr/election_2000_filcs/election2000.html.

equitable mode, serving as an impartial arbiter, and lending its imprimatur to the results.³⁴⁶

The first approach has the advantages of speed, predictability, transparency, and incorruptibility. There is an elemental fairness to stating all the rules of something as important as an election up front and following them wherever they may lead. Moreover, the decision to set the rules a priori reduces—but does not eliminate—the possibility that the rules will be manipulated for partisan advantage. If it is impossible for an election to ever serve as an absolutely accurate reflection of the true preference of the voters, perhaps the only way to conceptualize an election is as a contest the object of which is to receive the highest number of reported votes under the mechanisms and procedures the state has adopted. Among the members of the Supreme Court that decided *Bush v. Gore*, Justice O'Connor was the strongest public proponent of this view of elections and, thus, of such a view of the proper resolution of elections that fall within the margin of error.³⁴⁷

The second approach is borne out of the same democratic aspirations that motivate popular elections in the first place. According to proponents of this approach, the right to vote and have your vote counted is the core constitutive right of democratic citizenship.³⁴⁸ While it is eminently reasonable to use procedures that take expense and efficiency into account when tabulating the results in a normal election, the calculus changes markedly if any given election ends up within the margin of error. At that point, the right to have one's preference accurately recorded and reflected in the vote count becomes of paramount importance, trumping other considerations. The responsibility of the state is to bend over backwards to uncover and assimilate all tangible evidence of manifested voter intent. The state agencies vested with responsibility for resolving the disputed elections—whether they be executive agencies, courts, or some combination of the two—need to study the particular roadblocks to an accurate count raised by the states' voting technology and ballot counting procedures and devise protocols for minimizing the distorting effects of those roadblocks.

346. While I am sure they exist, I have searched in vain for an election for a state or national office in which the election fell within the margin of error, the state set out to count or recount ballots in a manner that involved some degree of independent judgment (rather than mere mechanistic retabulation), and the election did not in some way, shape, or form reach the courts. The fact that (nearly?) every such dispute ends in the courts does not, of course, mean that in every case the courts overturn the judgment of election officials. For an argument that the real cause of the crisis in 2000 was the Florida Supreme Court's failure to defer to election officials, see George L. Priest, *Reanalyzing Bush v. Gore: Democratic Accountability and Judicial Overreaching*, 72 U. COLO. L. REV. 953 (2001).

347. Justice O'Connor consistently voiced this sentiment at oral argument. See, e.g., Transcript of Oral Argument at 58, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), available at <http://election2000.stanford.edu/949trans.pdf> ("Why isn't the standard [for deciding that a ballot contains a legal vote] the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?").

348. See, e.g., Senator Barbara Boxer, *The Count Every Vote Act of 2005*, HUM. RTS. Q., Spring 2005, at 20.

Among the Justices of the Supreme Court, Justice Stevens has most vigorously advocated this vision as the proper resolution of elections falling within the margin of error.³⁴⁹

When faced with the choice between these two methods of resolving those elections falling within the margin of error, the great majority of American jurisdictions have chosen the latter approach. Evidence of this preference for inclusion abounds—in the statute books and constitutions of many states,³⁵⁰ in the decisions of state courts interpreting their election codes,³⁵¹ and in the decisions of federal courts policing state court interventions for constitutional infirmity.³⁵²

When, however, the Florida courts sided with the position taken by most states and established an equitable procedure for better ascertaining the intent of its voters,³⁵³ the United States Supreme Court put its foot down, twice granting certiorari and twice vacating opinions of the Florida Supreme Court.³⁵⁴ While the Court's first opinion was cryptic and its second fractured,³⁵⁵ the import of its decisions was crystal clear: the Florida Supreme Court was precluded from choosing between the two approaches to

349. See, e.g., *Bush v. Gore*, 531 U.S. at 1047–48 (2000) (Stevens, J., dissenting from order granting stay and writ of certiorari) (advocating that every legal vote should be counted); *Hartke v. Roudebush*, 321 F. Supp. 1370, 1378–79 (S.D. Ind. 1970) (Stevens, J., dissenting), *rev'd*, 405 U.S. 15 (1972) (adopting in large part then-Judge Stevens's dissent below).

350. See, e.g., ARIZ. REV. STAT. ANN. § 16-645(A) (1996 & Supp. 2005); CONN. GEN. STAT. § 9-150a(j) (West 2002 & Supp. 2005); IND. CODE ANN. § 3-12-1-1 (West 1997); ME. REV. STAT. ANN. tit. 21-A, § 1(13) (1993 & Supp. 2005); MD. CODE ANN., ELEC. LAW § 11-302(d) (LexisNexis 2003); MASS. GEN. LAWS ANN. ch. 53, § 70E (West 1991); TEX. ELEC. CODE ANN. § 65.009(c) (Vernon Supp. 2005); VA. CODE ANN. § 24.2-644(A) (2003).

351. See, e.g., *Boardman v. Esteve*, 323 So.2d 259, 269 (Fla. 1975) (“In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected.”); *State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (Fla. 1940) (“It is the intention of the law to obtain an honest expression of the will or desire of the voter.”); *Pullen v. Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990) (“The purpose of our election laws is to obtain a correct expression of the intent of the voters.”); *Delahunt v. Johnson*, 671 N.E.2d 1241, 1243 (Mass. 1996) (holding that the role of government is to “seek to discern the voter’s intention and to give it effect”); *Duffy v. Mortenson*, 497 N.W.2d 437, 438 (S.D. 1993) (asserting that the duty of the courts is to “determine and carry out the intent of the voter”).

352. See, e.g., *Roudebush*, 405 U.S. at 25–26 (holding that a state may order a recount in a senatorial election without infringing the Senate’s power under Art. I, § 5); *accord Hartke*, 321 F. Supp. at 1378–79 (Stevens, J., dissenting) (arguing that the state authorities should be permitted to order a ballot recount without federal intervention).

353. See *Gore v. Harris*, 772 So.2d 1243, 1261–62 (Fla. 2000) (asserting that the court has authority to fashion such orders as it deems necessary to provide appropriate relief in election disputes); *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220, 1240 (Fla. 2000) (invoking “the equitable powers of [the] Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented”).

354. *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000); *cf. Bush v. Gore*, 531 U.S. 1046, 1046–47 (2000) (Scalia, J., concurring in order granting stay and writ of certiorari) (defending the decision of the Court to grant a stay of the second Florida Supreme Court decision).

355. See *Palm Beach County*, 531 U.S. at 70 (short and undefinitive per curiam opinion); *Bush v. Gore*, 531 U.S. at 98 (containing six opinions).

managing elections that fall within the margin of error. The state had no choice but to rely on the results as estimated by the voting machines (with whatever modifications the modest and mechanical automatic recounting procedures required).

B. Explaining the Reaction of the Court

To understand the Court's decision in *Bush v. Gore*, it is necessary to discern what got the Court's five most conservative members so worked up in the first place. Presumably, some of the Justices' initial animosity stemmed from the fact that the Florida Court (made up entirely of Democratic appointees)³⁵⁶ appeared to be acting against the interest of their preferred candidate. The decision to intervene may also have been based on a sense that it was somehow inappropriate for a local court to claim the last word on issues of such national import. Finally, it is certainly plausible that the Court was to some degree motivated by genuine disagreements as to the proper interpretation of Florida statutory law.

However, there was also something deeper and more visceral at work: a fundamental hostility toward the role the Florida Supreme Court took upon itself. Looking at the action of the Florida Court, what—beyond a politically disturbing outcome—did the five most conservative members of the Supreme Court see? While I suppose we will never be able to answer this question definitively, the analytic frame developed in the pages above suggests an answer. First, the majority Justices likely saw a lower court advocating the primacy of a litigation solution to a contentious public debate. While the Rehnquist Court is justifiably famous for its willingness to hoard for itself the last word on all manner of politico-constitutional questions,³⁵⁷ it has consistently expressed little patience with lower courts that have attempted to carve out for themselves a broader role in resolving disputes and administering justice.³⁵⁸ The certiorari petitions in this case thus presented the Justices with a rare opportunity to indulge both their judicial-supremacist

356. Justice Leander J. Shaw was appointed to the Florida Supreme Court in 1983 by Governor Bob Graham; Justice Major B. Harding was appointed in 1991 by Governor Lawton Chiles; Justices Charles T. Wells and Henry Lee Anstead were appointed in 1994 by Governor Chiles; Justice Barbara J. Pariente was appointed in 1997 by Governor Chiles; Justice R. Fred Lewis was appointed by Governor Chiles in 1998; and Justice Peggy A. Quince was appointed jointly by Governor Chiles and newly elected Governor Jeb Bush in 1998. Jessica Reaves, *They Who Must Decide: The Florida Supreme Court*, TIME, Nov. 15, 2000, <http://www.time.com/time/nation/article/0,8599,88402,00.html>.

357. See, e.g., Kramer, *supra* note 1, at 14, 128–29 (arguing that the Rehnquist Court views itself as “the *only* institution empowered to speak with authority when it comes to the meaning of the Constitution”).

358. Cf., e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484–85 (1989) (criticizing the lower court for reaching a result suggested by the Supreme Court's recent decisions but in conflict with more direct, albeit older, Supreme Court precedent, while simultaneously overruling its own precedent to reach same result as the lower court). See generally *supra* Part III.

tendencies³⁵⁹ and their judicial-passivist ideology;³⁶⁰ they could insert themselves into the spotlight only to rule definitively that meddling judges had overstepped their bounds.

The conservative Justices also likely took note of the fact that in addition to simply taking jurisdiction over this crucial national issue, the Florida Supreme Court had also cheerfully taken up the role of grand equitable umpire, vesting itself with the power to craft ad hoc remedial solutions to a problem the legislature had not fully contemplated. For many—perhaps most—Justices throughout our history, the role assumed by the Florida justices might not have seemed extraordinary. But for the five Justices who drove the tempo and timbre of the Rehnquist Court agenda, the Florida Supreme Court's embrace of such a role was a provocative act, one guaranteed to raise their hackles. If a court behaving in such a fashion in a routine civil case was enough to raise the ire of Justice Scalia or Chief Justice Rehnquist,³⁶¹ doing so when the presidency was on the line was sure to drive them to distraction. The Florida justices had inadvertently stumbled across the ideological fault line of the Rehnquist Court, a line not to be crossed.

C. *The Explanatory Power of the Court's Hostility to Litigation*

Without access to the minds—or better yet the souls—of the nine Justices, one cannot do justice to the myriad cross-cutting ideas, emotions, and strategic considerations that motivated their behavior during the tense days in which *Bush v. Gore* was decided.³⁶² However, the footprints their opinions left in the sand—particularly when read in light of their opinions in other contemporaneous cases—provide some clues as to their intellectual and psychological preoccupations. Just as an affinity for contemporary conservative politics and a penchant for arrogating itself a central role in the polity run through the Court's opinions, so too does a guttural contempt for ad hoc remediation efforts and the courts who undertake them. Moreover, reading *Bush v. Gore* through the prism of the Rehnquist Court's hostility to litigation offers explanations to several crucial puzzles about the Court's actions during this case that have thus far not been satisfactorily explained by the commentary.³⁶³

359. Cf. Kramer, *supra* note 1, at 14 (arguing that the Rehnquist Court was defined by an overarching "judicial supremacy").

360. Cf. Meltzer, *supra* note 62, at 343, 409 (arguing that the Rehnquist Court's non-constitutional decisions demonstrate a crabbed understanding of the judicial role that amount to unwarranted "judicial passivity").

361. See, e.g., *supra* subpart III(A) (discussing right of action cases in which courts arguably assumed such a role and the almost-hostile opinions reversing those decisions).

362. Though I was a law clerk for Justice Stevens during the term *Bush v. Gore* was decided, I emphasize that (1) I neither possess nor rely on any special insight into the hearts and minds of any of the Justices and (2) my analysis does not rest in any way on confidential in-chambers conversations or other privileged information.

363. The scholarly commentary has touched on how *Bush v. Gore* fits into the Rehnquist Court's debates about the role of courts and the proper scope of remediation, although only in ways

1. *The First Cryptic Per Curiam.*—The United States Supreme Court's first decision in *Bush v. Palm Beach County Canvassing Board*³⁶⁴ is widely considered to have been a strategic retreat by a Court unwilling to put its institutional credibility on the line by subjecting its bitter internal division to public scrutiny.³⁶⁵ Commentators reading the decision in such functionalist terms have largely assumed that the Court's ostensible legal rationale—that a remand was necessary so that the Florida Supreme Court could clarify whether it was striking down portions of the state's election code under the state constitution or merely interpreting ambiguous portions of the code in light of the values laid out in that constitution³⁶⁶—was simply the fig leaf that happened to be lying around when the Court reached for cover.³⁶⁷

Even assuming that the rationale was picked out of convenience rather than conviction, why did that particular issue happen to be lying around?³⁶⁸ In large measure, the answer may be the degree to which this relatively tepid claim is built upon some very pointed and very familiar accusations about the behavior of the Florida Supreme Court. Though the Article II hook that transformed the reference of the Florida Supreme Court to its own constitution into a federal issue was, of course, novel, the frustration of the Court at the methods of interpretation and argument of the Florida Supreme Court was entirely predictable, in that it drew on a familiar staple of anxieties about litigation, equity, and ad hoc judicial management.

tangential to the argument contained herein. See, e.g., Case, *supra* note 339, at 55–56 (outlining the extent to which *Bush v. Gore* is consistent with the Justices' general jurisprudential commitments); Spencer Overton, *Rules, Standards, and Bush v. Gore: Form and the Rule of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65, 66 (2002) (reading *Bush v. Gore* as an episode in the long-running debate between “rules” and “standards”); Robert A. Schapiro, *Article II as Interpretive Theory: Bush v. Gore and the Retreat from Erie*, 34 LOY. U. CHI. L.J. 89, 91 (2002) (interpreting the Chief Justice's concurring opinion as reflective of the Rehnquist Court's efforts to delegitimize non-textualist methods of statutory interpretation and the Court's drift back towards the understanding of the role of state courts reflected in *Swift v. Tyson*); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343 (2002) (reading the case for lessons about the remedial power of courts, but focusing only on the United States Supreme Court's remediation efforts, rather than those of the Florida courts); Young, *supra* note 1, at 1156 (discussing in passing whether *Bush v. Gore* fits into the Rehnquist Court's general aversion to broad remedial orders).

364. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

365. See, e.g., Linda Greenhouse, *Learning to Live with Bush v. Gore*, 4 GREEN BAG 2d 381 (2001) (noting that the opinion “masked profound divisions within the Court”); Linda Greenhouse, *Bush v. Gore: A Special Report*, N.Y. TIMES, Feb. 20, 2001, at A1 [hereinafter Greenhouse, *Bush v. Gore: A Special Report*] (explaining events in greater detail).

366. *Palm Beach County*, 531 U.S. at 77–78.

367. See, e.g., Strauss, *supra* note 339, at 185; Greenhouse, *Bush v. Gore: A Special Report*, *supra* note 365.

368. In suggesting that the argument was “lying around,” I do not mean to prejudge the question whether some Justices consciously picked a rationale they considered skimpy for strategic purposes. To the contrary, I mean to suggest that—whether or not they ultimately turn out to be meritorious—particular issues jump out of the pages of cases based on the intellectual and cultural milieu in which the reader is situated. They are, to use another metaphor, “in the air.”

Intelligent minds have disagreed about whether the Florida Supreme Court utilized the Florida Constitution to trump provisions of the state's election code and whether doing so actually violates the commands of Article II.³⁶⁹ On the level of doctrinal analysis, answering these questions is of obvious importance. However, in understanding both the dynamics of the election controversy and the Rehnquist Court's broader intellectual matrix, they are surprisingly irrelevant. Whether the Florida Supreme Court was invalidating the state's election laws under its own constitution or was simply referencing the state constitution as one source among many for its decision,³⁷⁰ the court was allowing a broad and abstract cultural commitment to democracy—rather than a careful parsing of statutory text—to drive its analysis. While the Rehnquist Court did not universally shy away from such a methodology, particularly in federal constitutional cases,³⁷¹ it generally employed a tighter, more text-driven methodology in its own work³⁷² and frequently castigated lower courts for failing to do so.³⁷³

Turning to the text of the Florida Supreme Court's decision only reinforces the conclusion that the state court drafted an opinion almost uniquely designed to provoke the anger of the Rehnquist Court. While the opinion contained a section carefully analyzing the structure and text of the relevant statutory provisions,³⁷⁴ the court cabined off that discussion into a separate part, likely to be overlooked by readers drawn to the opinion's more incendiary passages. In making the case for a broad remedial solution to the electoral deadlock, the court borrowed from prior decisions a series of block quotes and decontextualized pronouncements all loudly trumpeting a commitment to democracy in language more conducive to a civics textbook than to a judicial opinion.³⁷⁵ Most importantly, it clumsily articulated its

369. Compare Balkin, *supra* note 342, at 1413–25 (criticizing the Court's resolution of these issues) and James A. Gardner, *The Regulatory Role of the State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625, 628–29 (2001) (same) with Richard A. Epstein, "In Such Manner as the Legislature May Direct": *The Outcome in Bush v. Gore Defended*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT, *supra* note 339, at 13 (supporting the Court's interpretation) and Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 48–53 (same).

370. The latter being my view.

371. See generally *supra* subpart IV(A) (discussing the Rehnquist Court's sovereign immunity decisions); see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding laws banning consensual same-sex sexual activity unconstitutional, relying primarily on general notions of liberty and autonomy). For the use of such reasoning in statutory cases, see, for example, *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001), which read in a "reasonable time" limitation on the allowable period of detention of foreign aliens into the relevant statutes, despite the absence of any statutory language mandating such a limit.

372. On the "textualist" focus of the Supreme Court's statutory interpretation jurisprudence, see, for example, Eskridge, *supra* note 41, at 652–58; Manning, *supra* note 41, at 3–7.

373. See, e.g., *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004) (criticizing the court of appeals for "fail[ing] to examine . . . surrounding language" in interpreting a statute).

374. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1230–36 (Fla. 2000).

375. Among the choicest examples, one might count:

project in a series of jaw-dropping sentences whose content was perfectly defensible but whose bluntness and phrasing could not have been better designed to antagonize the Rehnquist Court's traditional majority.³⁷⁶

Nor did it help the Florida Supreme Court's cause that its decision invoked disfavored methods of statutory interpretation for the very purpose of granting the courts greater power. Not only was the Florida Supreme Court jettisoning "technical statutory requirements"³⁷⁷ to pursue the vindication of the "preeminent right" without which "all others would be diminished,"³⁷⁸ but it was also arrogating to itself ultimate authority over the details of the ad hoc machinery designed to make real that commitment. While perhaps—and I stress perhaps—either a grossly purposivist method of statutory interpretation or a conclusion that vested ultimate remedial authority in the courts might have slipped past the Rehnquist Court, an

The real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. *The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.* We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Id. at 1227–28 (emphasis added) (quoting *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975)); and:

It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights . . . have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade these vital rights of personal liberty and private property, "Thus far shalt thou come, but no farther."

Palm Beach County, 772 So. 2d at 1236 (quoting *State v. City of Stuart*, 120 So. 335, 347 (Fla. 1929)).

376. See, e.g., *Palm Beach County*, 772 So. 2d at 1227 ("Twenty-five years ago, this Court commented that the will of the people not, a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases . . ."); *id.* at 1237 ("Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy. Technical statutory requirements must not be exalted over the substance of this right.") (footnotes omitted); *id.* at 1239 ("[T]he will of the electors supersedes any technical statutory requirements: '[T]he electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election. There is no magic in the statutory requirements.'") (alteration in the original) (quotations omitted).

377. *Id.* at 1237.

378. *Id.* at 1236.

opinion combining both had virtually no chance in the hothouse environment of a Court already accustomed to protracted battles over just such issues.

The sophisticated Supreme Court litigators and former Supreme Court clerks representing Governor Bush quickly realized that the Florida Supreme Court had stumbled into the wheelhouse of the Supreme Court and packaged their merits brief accordingly. From the very first pages, their brief is filled with references to the Florida Supreme Court's decision as an "equitable decree,"³⁷⁹ long verbatim quotations of the passages discussed above,³⁸⁰ and increasingly acerbic references to the state court's unwillingness to allow "hypertechnical" interpretations³⁸¹ or "technical statutory requirements" to settle the case.³⁸² The Florida Supreme Court's purported "reluctance to rewrite the Florida Election Code" is pointedly contrasted with its decision to "invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here."³⁸³

Whatever the issue, the brief's argument is the same—this case is an example of power-hungry, equity-embracing judges run amok. For example, the section on the federal statutory question that initially lead the Bush campaign's argument includes eight increasingly contemptuous references to the Florida Supreme Court's embrace of "equity" or "equitable powers."³⁸⁴ The Article II argument that follows ratchets up the argument one degree, claiming that the Florida Supreme Court "made clear that it felt no obligation to adhere to the statutes applicable to the election."³⁸⁵ By the time the brief even mentions the references to the Florida Constitution that ended up justifying the remand, the Bush lawyers had carefully packaged the Florida Supreme Court as a power-hungry body, intent on running roughshod over the state election code, federal statutes, and the federal Constitution in order to feed its insatiable equitable appetite. Placed in that context, the purported reliance of the Florida Supreme Court on the state constitution is portrayed not only as a legal error, but also as a cynical attempt to find cover for a blatant power grab or, in the words of the brief, "an unconstitutional arrogation of power."³⁸⁶

379. See, e.g., Brief for Petitioner at 1, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836), 2000 WL 1761134 (referring twice to the Florida Supreme Court's opinion as an equitable decree).

380. *E.g.*, *id.* at 10–11.

381. *Id.* at 10, 13, 45 (referring to the Florida Supreme Court's rejection of "hypertechnical" reliance on statutory language).

382. *Id.* at 10, 26, 45, 50–51 (referring to the state court's unwillingness to defer to "technical statutory requirements").

383. *Id.* at 11; see *id.* at 18, 46 (making similar points using same language).

384. *Id.* at 18, 19, 21, 25, 26, 31 n.9. Interestingly, when the brief references "equity," it puts the term in quotation marks, the written equivalent of a cocked eyebrow.

385. *Id.* at 44–45.

386. *Id.* at 48. One of the primary authors of the brief was law professor Jolm Manning, a former clerk for Justice Scalia and the leading academic proponent of the argument that careful textual methods of statutory interpretation are constitutionally required. See John F. Manning,

2. *The Curious Persistence of the Article II Issue.*—When the election controversy returned to the Court a second time, the fragile harmony of the *Palm Beach County* per curiam opinion quickly crumbled. As we all know, the fractured opinions in *Bush v. Gore* included another per curiam in which the Rehnquist Court's usual five-justice majority determined that the failure of the Florida Supreme Court to specify precise standards for conducting further recounts violated the Equal Protection Clause of the Fourteenth Amendment and that, under the relevant state statute, time had run out on any further attempts to specify such standards.³⁸⁷ Though this was the basis for the decision, it was not the issue on which the Justices focused the bulk of their writing. To the contrary, the opinions included a substantial concurrence by Chief Justice Rehnquist (joined by Justices Scalia and Thomas)³⁸⁸ and opinions by each of the four dissenters all focusing on the propriety of the behavior of the Florida courts and the Article II consequences of the state courts' mode of judging.³⁸⁹ The Justices' strong interest in these issues is further evidence for the proposition that, at least in part, they experienced the Florida election cases as yet another battle over the propriety of litigation solutions to contentious public issues and the remedial role of the courts.

This connection is particularly evident in Chief Justice Rehnquist's concurring opinion. While a thorough parsing of the opinion's argument is beyond the scope of this Article, it is worth exploring briefly the degree to which the opinion encapsulates an attitude about the work of the courts that

Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673, 675 (1997); Brief for Petitioner at 51, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836) (listing Professor Manning as counsel); David Von Drehle et al., *In Florida Drawing the Battle Lines: Big Guns Assembled as Recount Begins*, WASH. POST, Jan. 29, 2001, at A1 (discussing Professor Manning's central role in formulating arguments for the brief). While the Rehnquist Court has never gone so far as to argue that as a general matter its preferred methods of statutory construction are constitutionally required, it has made it clear that it views many alternative strategies as fundamentally misguided and illegitimate. See, e.g., *Puh. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 473 (1989) ("Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable."); *United Steelworkers v. Weber*, 443 U.S. 193, 221 (1979) (Rehnquist, J., dissenting) ("Today . . . the Court behaves much like the Orwellian speaker earlier described . . . [W]ithout even a break in syntax, the Court rejects 'a literal construction . . . ' in favor of newly discovered 'legislative history.'"). The Republican briefs were able to harness the majority's sympathy for the proposition that there is something suspect about broader, multi-faceted methods of statutory interpretation by arguing that in this particular context Article II provides a textual hook for their inclination that the Constitution commands their vision of the judicial role.

387. *Bush v. Gore*, 531 U.S. 98, 110 (2000).

388. *Id.* at 111 (Rehnquist, C.J., concurring).

389. *Id.* at 123–24 (Stevens, J., dissenting) (addressing the Article II issue); *id.* at 129, 130–33 (Souter, J., dissenting) (addressing the Article II issues in depth before turning to the equal protection question); *id.* at 135–43 (Ginsburg, J., dissenting) (addressing the Chief Justice's argument by name and in long detail); *id.* at 145, 147–52 (Breyer, J., dissenting) (same).

broadly characterizes the Rehnquist Court's jurisprudence (and especially the jurisprudence of its three signers).

From the onset, the concurring opinion is a biting indictment of the Florida Supreme Court's behavior and methodology. That approach is initially laid bare in a revealing, preliminary observation: In scrutinizing the meaning of the relevant Article II provision, the Chief Justice asserts that, given the language of the federal Constitution, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."³⁹⁰ While it is easy to glide over that observation particularly during an era dominated by textualist statutory interpretation, the Chief Justice's argument is actually quite radical. He is not arguing, as many conservative lawyers and commentators did, that, under Article II, the state courts have no role in interpreting their election laws nor that such a role exists only at the sufferance of the legislature. These claims, while substantively debatable, are coherent explanations of the division of powers mandated by Article II.³⁹¹ Rather, his assertion is that the courts are free to speak to the meaning of the law but that one should not confuse the courts' construction of the statute with its true meaning. As the dissenters argue, the Chief Justice's point, no matter how rhetorically powerful it may be, is incoherent within the framework of traditional methods of statutory interpretation and traditional understandings of the separation of powers.³⁹² Many laws, particularly dense and confusing laws like Florida's election code, often need judicial interpretation to take full effect. Historically, once judges speak to the relevant questions of statutory interpretation, these judicial decisions give meaning to the statute and are treated as if they have always been part and parcel of the statutory text.³⁹³ To argue, as the Chief Justice does, that there exists a true meaning of a statute that exists apart from its judicial interpretation (and that can be discerned from a commonsense parsing of the statutory language) is to suggest that the

390. See *id.* at 111, 113 (Rehnquist, C.J., concurring); see also *id.* at 115 ("This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures.").

391. See Richard A. Epstein, *In Such Manner as the Legislature Thereof May Direct, The Outcome in Bush v. Gore Defended*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT*, *supra* note 339, at 1, 19–35 (noting that "[i]f . . . the state courts or executive officials have failed properly to apply the state scheme, resulting in a gross deviation from the legislature's directives, then a federal court can review the matter under Article II").

392. Cf., e.g., *Bush v. Gore*, 531 U.S. at 130–31 (Souter, J., dissenting) ("Bush does not, of course, claim that any judicial act interpreting a statute of uncertain meaning is enough to displace the legislative provision and violate Article II; statutes require interpretation, which does not without more affect the legislative character . . ."); *id.* at 141 (Ginsburg, J., dissenting) ("The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments.").

393. See, e.g., *id.* at 128 & n.6 (Stevens, J., dissenting) ("Like any other judicial interpretation of a statute, [the Florida court's] opinion was an authoritative interpretation of what the statute's relevant provisions have meant since they were enacted."); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994) (explaining the rationale behind and operation of this principle).

judiciary has so fundamentally failed to perform its duties that we should regard as fictional, and therefore discard, this well-established mechanism for coordinating the crucial functions of the legislature and the judiciary. To do so off-hand and without explanation, as the Chief Justice does, is to suggest that that failure is so systemic and so obvious that no explanation is necessary. In one seemingly innocuous comment, Chief Justice Rehnquist speaks volumes about the Supreme Court's assessment of the work product of the contemporary American judiciary.³⁹⁴

The opinion strongly suggests that the Article II argument is nothing more than a convenient hook for an attack on the Florida Supreme Court's judicial methods. This is evidenced by the fact that the central substantive section of the opinion—Section II—spends eight paragraphs criticizing the state court's statutory interpretation without once citing to Article II or any other provision of federal law.³⁹⁵ This section goes out of its way to assume the cadence and the narrative of an appellate court opinion reversing a lower court's decision for abuse of discretion. First, it describes the state election code as a “detailed, if not perfectly crafted, statutory scheme,” both suggesting that the lower court had a responsibility to decipher and enforce the legislative will and offering a half-hearted excuse for its alleged failure to do so.³⁹⁶ Then it narrates the relevant statutes. When this section of the opinion finally turns to the Florida Supreme Court's interpretation of those statutes, it relies primarily on labels and conclusions, rather than argument, describing the state court's positions as having “no basis”³⁹⁷ and “of course absurd,”³⁹⁸ suggesting that “[n]o reasonable person would” adopt such positions,³⁹⁹ and insisting that the court “plainly departed from the legislative scheme.”⁴⁰⁰

394. A prevailing reading of the Chief Justice's opinion—one shared in large measure by the dissenting opinions—is that he was arguing that there was something so uncommonly rotten about the Florida Supreme Court's statutory interpretation that it could only be explained by rank partisanship and should, therefore, be treated as a legal nullity. See, e.g., *Bush v. Gore*, 531 U.S. at 135–36 (Ginsburg, J., dissenting) (“The Chief Justice maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging.”). Certainly, the Chief Justice's analogies to the decisions of the southern courts resisting the civil rights movement and the Virginia courts resisting the establishment of federal judicial review over state court judgments, *Bush v. Gore*, 531 U.S. at 114–15 & n.1 (Rehnquist, C.J., concurring), give that impression. The preliminary observation quoted in the text—in combination with the Court's other actions in this case and its decisions in other contemporary cases—suggests that, while the Chief Justice and Justices Scalia and Thomas saw the Florida Supreme Court's behavior as rotten, they did not necessarily see anything uncommon about that fact. To the contrary, the Chief and his ideological allies can almost be heard murmuring “there they go again.”

395. *Id.* at 116–20 (Rehnquist, C.J., concurring).

396. *Id.* at 116.

397. *Id.* at 120.

398. *Id.* at 119.

399. *Id.*

400. *Id.* at 118.

There is not a word in this section about the Florida courts taking on powers prohibited by Article II or about the court relying on sources that are not legitimately within its purview. The Article II argument made in this opinion is more straightforward and less refined than the one hinted at in the first opinion and argued for in Governor Bush's briefs.⁴⁰¹ According to the Chief Justice, the Florida courts violated Article II simply by being bad judges. A sense of constrained catharsis permeates the opinion: tightly bridled joy at smacking down an activist, equity-oriented, litigation-friendly court seeps out of the text at its every pore.

Like in the first case,⁴⁰² the general indictment by the Court of the Florida Supreme Court's methodology is coupled with a substantive hostility to an equity-driven, court-oriented approach to resolving elections that fall within the margin of error. In fact, it is a series of assumptions about the absurdity of such an approach that provide the "evidence" put forth by the Court in its condemnation of the Florida Supreme Court's performance. The Chief Justice's concurring opinion firmly states that "Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots"⁴⁰³ and lampoons the idea that "an error in the vote tabulation" or a "rejection of . . . legal votes" has occurred when "electronic or electromechanical equipment performs precisely in the manner designed."⁴⁰⁴ The idea that the Florida legislature would have adopted an election code which "regularly produces elections in which legal votes are predictably *not* tabulated, so that in close elections manual recounts are regularly required" is "absurd" to the three concurring Justices.⁴⁰⁵ The provision of instructions, sample machines, and sample ballots, and the posting of a warning to recheck one's ballot (in capital letters) are treated as *prima facie* evidence that the state has no interest in the complaints of would-be voters whose preferences are not properly recorded.⁴⁰⁶

These observations are wonderfully evocative of the worldview shared by these three Justices. The idea that we live in an imperfect world where systems that are normally efficient and workable might still break down under stress is foreign to them. The thought of a system whereby the legislature recognizes the impossibility of predicting every eventuality and cedes remedial power to the courts to deal with unexpected contingencies sends shudders down their spines. The notion that anyone—let alone the majority of a state legislature—might favor a system whereby we bend over backwards to discern the intention of voters who were not capable of following the rules prominently displayed in their polling places is

401. See *supra* section V(C)(1).

402. See *supra* text accompanying notes 364–376.

403. *Bush v. Gore*, 531 U.S. at 118–19.

404. *Id.* at 119.

405. *Id.*

406. See *id.* (recounting these steps and reprinting the warning (still in capital letters)).

inconceivable. That substantive justice might be achieved by such a system is of no moment. Ad hoc remedial solutions are to be avoided at all costs.

3. *The Chasm Between the Majority and Justices Breyer and Souter.*—The majority went out of its way to claim a 7–2 victory on the crucial equal protection issue.⁴⁰⁷ Given the focus of the public on the bottom line of who would be president, this would have been a hard sell no matter what Justices Souter and Breyer said in their opinions. However, the strident language with which they attacked the majority’s resolution of the case and the care they took to mark themselves as dissenters made it impossible.⁴⁰⁸ Still, their acceptance of the majority’s central argument hangs like a pall over the case, confusing those who seek a simple explanation for the division of the Court. In particular, readers of the opinions have found it difficult to understand why Justices Souter and Breyer attacked the majority with such relish if their “only disagreement [wa]s as to the remedy” for the state’s unconstitutional actions.⁴⁰⁹

Reading the case through the prism of the Court’s hostility to litigation provides an easy answer to this question. While Justices Souter and Breyer disagreed with the majority only as to remedy, remedies are in the end, what the case is about: remedies for flawed ballots; remedies for failing technology; remedies for partisan behavior by local and statewide election officials; remedies for election procedures that did not provide detailed instructions for handling the kind of crisis the election had produced; and remedies for judges who were over-cautious or over-aggressive in constructing solutions to all of the other remedial problems. The overarching issues that separated the majority and the dissent were the questions of how such momentous remedial issues should be resolved and by whom. For the majority, as most vocally articulated by the Chief Justice’s concurrence,⁴¹⁰ the answer was obvious: whatever limited remedial options the designated election officials deemed available under the state’s election code should be followed and the results of the election certified without

407. See *id.* at 111 (asserting that “[s]even Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy” and then citing Justice Souter’s and Justice Breyer’s opinions).

408. Both opinions were styled as “dissenting” opinions rather than opinions “concurring in part and dissenting in part.” Their conclusions are instructive as well. See *id.* at 129 (Souter, J., dissenting) (“The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.* or this case The case being before us, however, its resolution by the majority is another erroneous decision.”) (internal citations omitted); *id.* at 158 (Breyer, J., dissenting) (“I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary ‘check upon our own exercise of power,’ ‘our own sense of self-restraint.’ Justice Brandeis once said of the Court, ‘The most important thing we do is not doing.’ What it does today, the Court should have left undone. I would repair the damage as best we now can, by permitting the Florida recount to continue under uniform standards.”) (internal citations omitted).

409. *Id.* at 111 (Rehnquist, C.J., concurring).

410. See *supra* section V(C)(2).

recourse to any further judicially crafted remediation. For the dissenters, including Justices Souter and Breyer, the answer was equally obvious: the Florida courts should exercise their authority under Florida law “to fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.”⁴¹¹

In order to understand why Justices Souter and Breyer styled themselves angry dissenters, we need only take seriously what they wrote on this issue. Both men believed that the Florida courts were simply doing their job in taking on the role of equitable umpires and working to craft a litigation-driven ad hoc remedial solution to the problems posed by this peculiar election.⁴¹² They thought that the Florida courts might well have crafted an appropriate and constitutionally permissible set of remedies if left alone to complete their work.⁴¹³ They believed the Court acted precipitously and without legal justification in intervening to stop the remedial project *in media res*.⁴¹⁴ Forced to address the Florida Supreme Court’s half-finished remedial scheme as frozen in time by the Court’s precipitous stay, Souter and Breyer reluctantly concluded that the truncated remedial scheme before the Court—which was never intended to be the complete Florida scheme in the first place⁴¹⁵—violated the Equal Protection Clause.⁴¹⁶ Even then, it seemed

411. FLA. STAT. § 102.168(8) (Supp. 2001); see *Bush v. Gore*, 531 U.S. at 133 (Souter, J., dissenting) (quoting this language); *id.* at 152 (Breyer, J., dissenting) (same).

412. See, e.g., *Bush v. Gore*, 531 U.S. at 133 (Souter, J., dissenting) (concluding that the Florida Supreme Court “engaged in permissible construction” of relevant state law and “proceeded to direct the trial judge to deal with [the matter] in the exercise of the discretionary power, generously conferred by” the Florida statute); *id.* at 152 (Breyer, J., dissenting) (citing to the same Florida statute in defending the Florida courts’ remedial activity).

413. See, e.g., *id.* at 129 (Souter, J., dissenting) (“If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review”); *id.* at 133 (Souter, J., dissenting) (concluding that the Equal Protection issue “might well have been dealt with adequately by the Florida courts if the state proceedings had not been interrupted”); *id.* at 153 (Breyer, J., dissenting) (lamenting that the equal protection issue “might have been left to the state court to resolve if and when it was discovered to have mattered”).

414. See, e.g., *id.* at 129 (Souter, J., dissenting) (“The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.* or this case, and should not have stopped Florida’s attempt to recount all undervote ballots by issuing a stay of the Florida Supreme Court’s orders during the period of this review.”) (citations omitted); *id.* at 144 (Breyer, J., dissenting) (“The Court was wrong to take this case. It was wrong to grant a stay.”).

415. The Florida Supreme Court’s opinion had not itself established a remedial scheme (except to the extent that it ordered the inclusion in the vote count of votes that had already been identified in two counties), but rather had, consistent with the relevant statutes—see, for example, FLA. STAT. § 102.168(5) & (8) (Supp. 2001)—remanded the case to the circuit court for the crafting of appropriate equitable orders. See *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000). The circuit court judge had then ordered the counties to proceed, offering no initial guidance beyond the statutory intent of the voter standard. However, the circuit court judge continued to supervise the case and was charged with the authority to review the conclusions of the county election officials, to impose further or different requirements, and to order any appropriate relief. See *id.*; see also *Bush v. Gore*, 531 U.S. at 126 (Stevens, J., dissenting) (noting that “a single impartial magistrate will

obvious to the two Justices that the case should be remanded to the Florida courts to allow them to continue managing the case in their equitable roles.⁴¹⁷ Both Justices seemed to trust that the result of such a remand would be the fair and constitutional remediation of the two parties' grievances.⁴¹⁸ More to the point, they assumed that such remediation was the goal toward which all parties should be striving.

4. *Justice Stevens's Famous Dissent.*—Of all the words written by the Justices in their various opinions in *Bush v. Gore*, none have been more quoted than the concluding lines of Justice Stevens's dissenting opinion: "Although we may never know with complete certainty the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."⁴¹⁹ That bold statement of dissatisfaction has—more often than not—been read as a general lament about the effect of the Court's decision on popular confidence in the Supreme Court, implicitly predicting that the people will read the Court's opinion and see it for the laughably partisan act that it is. However, as conservative commentators have been quick to point

ultimately adjudicate all objections arising from the recount process"). Whether the Florida courts' ultimate remedial order would have been subject to the same constitutional objections as the interim remedial scheme the Court reviewed is yet another question whose answer "we may never know with complete certainty." *Id.* at 128 (Stevens, J., dissenting).

416. *See, e.g., id.* at 133–34 (Souter, J., dissenting) (determining that, "because the course of state proceedings has been interrupted, time is short, and the issue is before us," it is "sensible" for the Court to reach the merits of the equal protection issue and that the practice of following different standards in different counties "appear[s] wholly arbitrary"); *id.* at 144–45 (Breyer, J., dissenting) (decrying the decision of the Court to take the case, justifying the actions of the Florida Supreme Court in denying to set "uniform subsidiary standards" for vote counters, and concluding that "in these very special circumstances" the Florida court's failure to set such standards "implicate[s] principles of fundamental fairness"). It is worth noting that, unlike Justice Souter, Justice Breyer never comes out and says that the Equal Protection Clause has been violated.

417. *See, e.g., id.* at 134–35 (Souter, J., dissenting) ("I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied with and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order."); *id.* at 146 (Breyer, J., dissenting) ("An appropriate remedy would be, instead, to remand this case with instruction that, even at this late date, would permit the Florida Supreme Court to require recounting *all* undercounted votes in Florida . . . and to do so in accordance with a single uniform standard").

418. *See, e.g., id.* at 135 (Souter, J., dissenting) (concluding that, while recounting all the ballots in a short timeframe "would be a tall order," "the courts of Florida were ready to do their best to get that job done"); *id.* at 153 (Breyer, J., dissenting) (stating that the equal protection claim "could still be resolved through a remand conditioned upon the issuance of a uniform standard" which would simultaneously protect the "competing fundamental consideration" of fairness to those whose votes have not been counted); *id.* at 147 (Breyer, J., dissenting) ("Nor do I understand why the Florida Supreme Court's recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.").

419. *Id.* at 128–29 (Stevens, J., dissenting).

out,⁴²⁰ when the statement is put into context, the full text suggests that Justice Stevens is referring not to the consequences of the public disbelieving the Supreme Court (thereby losing confidence in it) but to the consequences of the public *believing* the Court (thereby losing confidence in the state court judges whose work the Court lambastes and reverses).⁴²¹ If Justice Stevens is just telling the Court not to belittle state courts, why the impassioned rhetoric? The Supreme Court criticizes state courts all the time. If state courts got the law wrong in this case, they deserve some criticism, particularly if the case is very important and if, as the majority believes, they got it really wrong.⁴²²

The explanation for the passion of Justice Stevens's rhetoric lies in the same matrix of ideas and attitudes about the role of courts and litigation that has engaged the two wings of the Rehnquist Court for almost two decades. Though not a doctrinaire liberal or a particular friend to plaintiff's litigation,⁴²³ Justice Stevens has long been a committed opponent of the Court's anti-litigation turn. As others have noted,⁴²⁴ Justice Stevens is in many ways an old-school common law judge, comfortable with legal principles expressed in standards rather than rules. Sanguine about the ability of a learned bench to resolve complicated disputes by the application of their judgment, Justice Stevens has crafted opinions that demonstrate increasing frustration with the efforts of some of his colleagues to strip courts of interpretive authority, remedial powers, and discretion.⁴²⁵ For Justice

420. See, e.g., Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1221–24 (2002).

421. To underscore the fact that I and Justice Stevens's other law clerks from October Term 2000 possess no privileged insight into the "true meaning" of this dissenting opinion, I note that my friend and co-clerk Professor Eduardo Peñalver disagrees in large part with my reading of these lines. See Email from Eduardo Peñalver, Visiting Associate Professor, Yale Law School, to author (Dec. 9, 2005) (on file with author).

422. See, e.g., Ann Althouse, *The Authoritative Lawsayng Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush–Gore Litigation*, 61 MD. L. REV. 508, 565–66 (2002); Lund, *supra* note 420, at 1223.

423. That Justice Stevens has long been considered an independent-minded and iconoclastic jurist is a proposition barely in need of citation. Just in case, see William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1088. Though he has largely been a dissenter from the developments discussed in this Article, that is not universally the case. In particular, he has been a leader in the development of the new constitutional law of punitive damages discussed *supra* subpart III(D).

424. See, e.g., Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE, *supra* note 1, at 162; Popkin, *supra* note 423. Justice Stevens's jurisprudence is the subject of a recent volume of conference essays, many of which emphasize his common-law approach and his preference for standards over rules. See generally Symposium, *The Jurisprudence of Justice Stevens*, 74 FORDHAM L. REV. (forthcoming March 2006).

425. See, e.g., *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (attacking the majority's endorsement of an "unstated lack of confidence in the impartiality and capacity of state judges" that "can only lend credence to the most cynical appraisal of the work of judges"); *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2816 n.6 (2005) (noting that the Court's "overconfident 'only us' approach" to interpreting state law "lacks any cogent justification"); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 219, 221–22 (2002) (reading certain ERISA provisions, contrary to

Stevens (and others of his generation and/or disposition),⁴²⁶ the assault of the Rehnquist Court on the efficacy of litigation and the authority of the courts, is not a mere doctrinal trend, but rather an altogether-too-personal attack upon the abilities and integrity of the judiciary.

The combination of his disagreement on first principles with the Rehnquist Court's dominant anti-litigation sentiment and his sense of personal and professional insult at the implications of that trend have, in recent years, bubbled over in any number of heated dissents.⁴²⁷ In fact, as noted above, the standard rhetoric in which the Court's wings engage on issues of remediation and judicial power is remarkably pointed, particularly in light of the relative narrowness of the issues in some of the cases.⁴²⁸ To an extent not noticed by the commentators, Justice Stevens's dissent in *Bush v. Gore* simply mirrors the tone and themes of his dissents in cases like *Sandoval*,⁴²⁹ albeit on a much larger stage.

These themes emerge early in Justice Stevens's dissent. For example, in his initial discussion of the Article II issue, he portrays the position of those who challenge the Florida Supreme Court's role in the case—or their references to the state constitution—as a challenge to “judicial review.”⁴³⁰ When he turns to the merits of the equal protection issue, he expresses genuine surprise and dismay that anyone would suggest that the Constitution has anything to say about whether state legislators and state supreme courts should frame their initial commands to factfinders in terms of general standards (e.g., follow the “intent of the voter”) or more rigid rules (e.g., only count punchcard votes if the chad is dislodged in three corners).⁴³¹ Moreover, to the extent that the use of different substandards by different counties might create initial inequities, those inequities can be managed by “the single impartial magistrate” who “will ultimately adjudicate all objections arising from the recount process.”⁴³² In short, the Florida courts were doing what judges always have done—reviewing and interpreting statutes, using their judgment to give content to general standards, and acting in their equitable mode to manage remedies and alleviate developing inequities.

the majority's view, “as having been intended to enlarge, not contract, a federal judge's remedial authority”).

426. Cf. *Republican Party of Minn. v. White*, 536 U.S. 765, 803 (2002) (Ginsburg, J., dissenting) (defending the impartiality of the judiciary and the importance of its functions and arguing that the Court ignores these values by striking down Minnesota's restrictions on the speech of judicial candidates).

427. His dissents to the cases cited in subpart III(A) are a good starting point.

428. See *supra* subpart III(A).

429. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (Stevens, J., dissenting).

430. *Bush v. Gore*, 531 U.S. at 123 (Stevens, J., dissenting).

431. See *id.* at 124–25.

432. *Id.* at 126.

Justice Stevens next makes the point that, in failing to remand the case for further recounts under a more uniform standard, the majority is leaving other (greater) inequities unremedied.⁴³³ While this point troubles Justice Stevens, it does not surprise or detain him for long. After nearly two decades as a member of the Rehnquist Court, Justice Stevens has been witness to dozens of decisions shrinking the remedial options open to litigants alleging violations of their rights.⁴³⁴ Like any careful observer of the Rehnquist Court, Justice Stevens understands that just because the voters whose uncounted votes reflect their intention have a right to have their ballots counted does not mean that the Court will accord them a remedy.

Wrapping up the opinion, he more explicitly states that the Florida courts simply “did what courts do” and notes again the ordinariness of a procedure that relies on a general legislative standard and review by an impartial magistrate to administer individualized justice.⁴³⁵ From there, he launches into his famous closing paragraph. In the specific context of the opinion and the broader context of his ongoing confrontation with the Rehnquist Court’s central anti-litigation, anti-judging theme, Justice Stevens’s words have particular resonance. For him, “petitioners’ entire . . . assault” is premised on “an unstated lack of confidence in the impartiality and capacity” of the judiciary.⁴³⁶ That the majority of the Court offers its “endorsement of that position”⁴³⁷ comes as no shock, for those same Justices have long operated with similar disdain for the abilities and integrity of judges. However, it is still disturbing, for this assault on the judiciary “can only lend credence to the most cynical appraisal of the work of judges.”⁴³⁸ To Justice Stevens, this is frightening because “[i]t is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”⁴³⁹ Partisan fortunes may ebb and flow, but fears for the future will always be muted as long as the people possess an underlying faith in the “rule of law” and the “impartial guardian[s]” of that commitment.⁴⁴⁰ That the majority of the Supreme Court has itself lost that faith is the lesson and tragedy of not only *Bush v. Gore*, but also of the Rehnquist Court.

VI. Notes for a Rehnquist Court Historian

In the preceding Parts, I have sketched a picture of the Rehnquist Court as a court whose decisions are heavily influenced by an attitudinal orientation against litigation. This Part pulls back from the description offered in the

433. See *id.* at 126–27.

434. See generally *supra* subpart III(A) (discussing some such cases and explaining a trend).

435. *Bush v. Gore*, 531 U.S. at 128.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.* at 129.

previous parts to begin a discussion of the sources of this hostility. In pulling back from the descriptive to the explanatory, I tread with care. While this Article is intended as a participant in the burgeoning dialogue about the Rehnquist Court's legacy, it does not purport to be itself a work of history. Definitive historical analysis of the Rehnquist Court awaits a distant date where the passage of time will have provided information as to which of the Court's decisions have had a lasting impact, scholarly resources from other related subfields of American history, and a vantage point that—if not neutral—is at least removed from the unfiltered partisanship through which we tend to view our own times. Nevertheless, the careful examination of the caselaw required to construct this Article has left me with a number of hypotheses and impressions about the factors contributing to the Justices' litigation hostility. In this final Part, I offer some of those ideas, not as definitive explanations but rather as notes for future Rehnquist Court historians.

A. Defining the Phenomenon to Be Explained

The Rehnquist Court's orientation against litigation is a complicated phenomenon. To begin with, the Court's hostility to litigation defies easy categorization—it is a dense attitudinal orientation that is part intellectual and part visceral. Though it is not entirely rational, neither is it immune from rational influence. Therefore, it is rarely fully articulated in the Court's published writings but often referred to obliquely and relied on partially in the Court's reasoning. In certain categories of cases (such as private right of action cases),⁴⁴¹ dissenters occasionally engage the majority in colloquies about the Court's purported anti-litigation bent, but such instances are vastly outnumbered by cases where there is no dissent, where the dissenters ignore the majority's underlying anti-litigation sentiment, or where the dissenters express similar skepticism about litigation.

Second, the Court's hostility to litigation takes different forms in different cases. In some instances, it is targeted directly at the wisdom, propriety, or efficacy of litigation mechanisms for resolving disputes, righting wrongs, and administering justice.⁴⁴² At other times, the Court expresses its distaste for litigation solutions more obliquely, for example when it targets certain styles of judging that it perceives as encouraging or facilitating litigation.⁴⁴³ As we have seen, lower courts that embrace an

441. See *supra* subpart III(A).

442. See, e.g., *supra* subpart III(C) (discussing the Court's decisions privileging arbitration as a forum for resolving disputes).

443. See, e.g., *supra* subpart III(A) (discussing cases that not only directly involve the availability of remedies but also raise questions about the proper role of judges in facilitating or hampering litigation); *supra* Part V (treating these issues in the context of *Bush v. Gore*).

equitable role or adopt open-ended methods of statutory interpretation are likely targets of the Court's venom.⁴⁴⁴

Third, hostility to litigation cuts a broad swath across the Court's docket, but affects divergent areas of the law unevenly. Sometimes the Court's hostility comes through in the substance of its rulings, other times only in the rhetoric. At still other times the Court's anti-litigation orientation is entirely silent but still operates below the surface, shaping the frame of mind with which the Justices view particular cases and helping to calibrate their receptivity to particular arguments.⁴⁴⁵ Whether loudly trumpeted or silently operating, the Court's hostility is sometimes the lead story in a case; at other times, it is little more than interesting background music.

Fourth, the Court's orientation against litigation cuts across its political divisions in complicated ways. The five most conservative members of the Rehnquist Court are most consistent and most pronounced in their hostility to litigation. As a result, a great many decisions reflective of the Court's anti-litigation zeitgeist are decided by a five-to-four vote, with the usual quartet of Justices Stevens, Souter, Ginsburg, and Breyer in dissent. However, an anti-litigation impulse is present to some degree and in some form in the jurisprudence of each of the nine Justices. As a result, dozens of cases that reflect the anti-litigation theme have been decided by other majorities, sometimes broader ones, and on occasion unanimous ones.⁴⁴⁶ Even when the Court cleaves along familiar conservative/liberal lines in a given case, the dispute is often about the degree to which the modern Court should curtail litigation-friendly legal rules, rather than whether it should.⁴⁴⁷ In short, the Rehnquist Court's hostility to litigation is a phenomenon of the entire Court, not just of five of its Justices.

Finally, and most importantly, the Rehnquist Court's hostility to litigation coexists with a countervailing theme: a bold and self-confident protection of the Court's own institutional role. As many commentators have noted,⁴⁴⁸ this zealous protection of its own authority has led the Court to give less deference to the judgment of other actors—most noticeably Congress, but also administrative agencies, state officials,⁴⁴⁹ and even other courts.⁴⁵⁰ When the Court finds a case to be legitimately within its purview, it is likely

444. See, e.g., *supra* Part V (reading *Bush v. Gore* in part as an attack on courts who claim broad equitable powers).

445. The Court's federalism cases are a prime example. See *supra* Part IV.

446. For one classic example of an area that does not track the normal divide, see *supra* subpart III(D) (discussing punitive damage cases).

447. The Court's implied private right of action cases are again the best example. See *supra* text accompanying notes 111–113 (discussing the degree to which even dissenting Justices long ago rejected the traditional broad view of availability of such remedies).

448. See *supra* note 8 and works cited therein.

449. Cf. Colker & Scott, *supra* note 1 (discussing, quantifying, and analyzing current Justices' willingness to override and often demean the work product of state legislators, regulators, and judges).

450. See, e.g., *supra* Part V (discussing *Bush v. Gore*).

to demand the last word on questions of constitutional meaning, statutory interpretation, and often even factual validity, with little regard for preexisting institutional settlements that may have delegated some measure of interpretive independence to another body.⁴⁵¹

Ultimately, deciphering the intellectual and cultural sources for the Rehnquist Court's hostility to litigation is a two-fold project. First, one must make sense of the forces which have given rise to the Court's ubiquitous but constantly shifting skepticism towards litigation, equity, and judicial discretion. Then, one must explain how this anti-litigation impulse can coexist with a jealous protection of the Court's own interpretive and institutional authority.

B. Some Possible Explanatory Vectors

As tempting as it may be to offer a single over-arching explanation for the Rehnquist Court's hostility to litigation, the complex and under-theorized nature of the Court's hostility and the idiosyncratic way in which each Justice embraces the trend make such a neat explanation impossible. Historians who take as their project the cultural history of the Rehnquist Court will almost certainly need to wade through a thick set of political, cultural, doctrinal, and sociological factors to build a coherent explanatory model. What they will likely find is that the Court's hostility to litigation was shaped by a number of trends and influences, each pushing the Court generally in that direction, but each also suggesting a slightly different variant.

Among the explanatory vectors worthy of exploration, the political valence of the cases will certainly gain some attention. After all, it is difficult to ignore the degree to which the great bulk of the litigation-hostile decisions discussed above forward the policies or social vision of modern American conservatism.⁴⁵² So too with the majority of the cases in which the

451. This self-confidence is most notable in decisions that assertively protect the Court's exclusive authority to interpret the Constitution. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.") (internal citations and quotation marks omitted); *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) (holding that although earlier decisions, most notably *Katzenbach v. Morgan*, 383 U.S. 641 (1966), "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment," only the Court, and not the Congress, has the power to determine what constitutes a constitutional violation). To some extent this self-confidence also spills over to a more general unwillingness to see the power of the courts curtailed. *See, e.g.,* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (rejecting, with only one dissenter on this point, the President's broad claims as to his authority to detain American citizens as enemy combatants without judicial oversight).

452. To take but a few examples discussed above: (1) the Court's decisions often favor business interests by limiting damages, closing courts, or otherwise making it difficult for civil plaintiffs to prevail, *see generally supra* Part III; (2) in many areas, notably including sovereign immunity and

Court has loudly trumpeted its own interpretive authority or zealously protected its institutional role.⁴⁵³ A cynic or hardcore realist might insist that the Court's purported commitment to ensuring its own interpretive authority and its expressions of distrust towards the institution of Litigation are only rhetorical strategies or after-the-fact justifications employed in the service of a common substantive agenda when convenient and jettisoned when inconvenient. A more generous observer might suggest that the Court's jurisprudence is shaped by a commitment to achieving through law a particular (generally conservative) social vision and that the Court's rabid defense of its own institutional authority and equally tenacious hostility to litigation are merely twin learned responses developed through persistent interactions with other political and judicial actors who seek to use the law to forward alternative social visions. Whatever version one adopts, the political valence of the Court's decisions seems sufficiently correlated to the results of the case to demand careful historical consideration.⁴⁵⁴

While I suspect that the political valence of the relevant cases is crucially important in explaining the Rehnquist Court's dual commitments to litigation hostility and judicial supremacy, there are a number of other less obvious explanatory vectors worth serious examination. For example, both the Court's litigation hostility and its assertive constitutional decisions are consistent with the Court's embrace of what might (somewhat uncharitably) be dubbed a "civics textbook" vision of the Constitution's separation of powers provisions. In cases ranging from *Bush v. Gore*⁴⁵⁵ to *Whitman v. American Trucking Ass'n*,⁴⁵⁶ the Court's majority has paid increasing lip service to the axiomatic division of power we all learn as children: the legislative branch makes the law, the executive branch enforces the law, and

preemption, the Court's decisions have taken a noticeably anti-regulatory bent, *see generally supra* Part IV; (3) in striking down or narrowly construing anti-discrimination statutes or remedies for their violation, the Justices have embraced a narrower vision of the proper scope of society's commitment to anti-discrimination, *see generally* Rubinfeld, *supra* note 1; subpart III(A); and, of course, (4) the Court's decision in *Bush v. Gore* had the direct consequence of placing in the White House the Republican candidate for president, *see generally supra* Part V.

453. *See, e.g.,* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that states cannot be sued for damages for violation of employment provisions of the Americans with Disabilities Act); *Morrison*, 529 U.S. at 602 (invalidating civil remedy provision of the Violence Against Women Act).

454. The correlation is, of course, not perfect, a point that I have made throughout the text. Moreover, even if the fit between the political valence of cases and the Justices' behavior were perfect or near perfect, simply noting that fact would not provide a sufficient explanation for the Justices' hostility to litigation. The connection between conservative outcomes and the Court's decisions establishes only correlation, not causation. Even assuming that there is some motivating link between the conservative consequences of the Court's hostility to litigation and its decision to adopt such an orientation, a persuasive historical account of the phenomenon would require some account of the *mechanisms* of causation. The possibilities are endless—ranging from banal to conspiratorial, laudatory to condemnatory—but sorting through them is an entirely different project, one I am happy to leave for another day.

455. 531 U.S. 98 (2000).

456. 531 U.S. 457 (2001).

the judicial branch interprets the law. The Court's increasing embrace of that rhetoric suggests a growing impatience with the more complicated way in which duties have actually come to be divided in the American polity.⁴⁵⁷ This tendency to think about and talk about separation of powers issues in stark terms suggests that the Justices might actually see hostility to litigation and an assertive court-centered constitutionalism as two sides of the same coin, twin efforts to protect the legitimate prerogatives of the various branches of government from the natural tendency of the other branches to encroach on their authority. On this argument, the Court's hostility to litigation is actually hostility to the tendency of the courts to take upon themselves lawmaking powers that properly belong in the hands of legislative officials.⁴⁵⁸ When the tables turn, however, and Congress or the executive branch attempts to intrude on the core functions of the judicial branch (e.g., interpreting the Constitution, reviewing executive detention), the Court is properly vigilant to protect judicial authority.

Another vector worth examination is the degree to which the structure and sociology of the contemporary American legal profession might impact the way in which the Justices have viewed particular cases. While I have argued that the Rehnquist Court's hostility to litigation is over-arching, that does not mean that it is undifferentiated. To the contrary, as noted above,⁴⁵⁹ degrees of hostility have emerged, with particular kinds of litigation provoking an even harsher degree of skepticism. While the Court may conceptualize litigation in general as demeaning and disreputable, it appears to treat tort litigation (and related forms of what has come to be known as "plaintiff's litigation") as particularly so.⁴⁶⁰ On the flip side, the Court is least troubled by—indeed often genuinely excited to adjudicate—most forms of constitutional litigation (the claims of criminal defendants being a notable exception). While I have not studied this subject in any great detail, the

457. Leaving aside all normative questions, an honest descriptive survey of American government would almost certainly acknowledge that administrative agencies and executive officials make law through regulations and executive orders, courts utilize significant common-law and equitable tools to shape the content of law, the elected branches of government independently assess the legality and constitutionality of proposed conduct on a regular basis, and functions blur in innumerable other ways. In other words, "making" law, "enforcing" law, and "interpreting" law are not discrete functions that belong exclusively to one branch or another, but, at best, are fuzzy and mutable descriptions of the tasks traditionally associated with each branch; there is a great deal of play in the joints of government.

458. Throughout this Article, I have argued that this is not an accurate characterization of the totality of the Court's litigation-hostile jurisprudence. See text accompanying notes 109–110. However, that does not preclude the possibility that such ideas are a partial explanation for the Court's litigation hostility or in the words of this subpart, one "explanatory vector."

459. See, e.g., *supra* subpart III(D) (dealing with punitive damages); *supra* subpart IV(B) (dealing with preemption and the autonomy of state courts); cf. Morrison, *supra* note 62, at 623–25 (discussing the Rehnquist Court's particular hostility to "private attorney general" actions and noting that the Court's Article III injury doctrine "does significantly reduce the number of private individuals constitutionally eligible to bring such litigation").

460. See, e.g., *supra* subpart III(D) (dealing with punitive damages); *supra* subpart IV(B) (dealing with preemption and the autonomy of state courts).

Court's relative preference for particular kinds of litigation roughly tracks the stratification of the American bar. With sufficient exceptions to make one weary of stating a rule, the best-trained and best-connected lawyers tend to congregate in two areas of practice, civil defense and constitutional litigation. (Indeed, the development of appellate practice groups at many leading law firms has allowed many lawyers to practice actively in both areas.) To a large extent, those categories accurately reflect the bulk of the Justices' own practice experience.⁴⁶¹ To an even greater extent, they track the experiences of the friends and former clerks with whom they interact on a regular basis. Though one does not want to overstate the connection, at some visceral level the Justices' generalized but stratified hostility to litigation may reflect the professional values and interests of the elite American bar, a group that as a whole embraces and practices most species of constitutional litigation but spends the bulk of their litigation time defending against routine civil cases.

VII. Conclusion

This Article is self-consciously styled as part of an evolving group effort to write the first draft of the Rehnquist Court's history. Its particular project is to bring to the forefront an over-arching theme that has been largely ignored, downplayed, or mischaracterized by prior commentators: the Court's hostility to litigation. In forwarding the Court's litigation hostility it neither discounts the importance of other strands in the Rehnquist Court's intellectual matrix nor seeks to impose external coherence on the Court's under-theorized and at times internally contradictory litigation-hostile impulses. To the contrary, the Article attempts to lay out in a pointillist fashion an image of the Rehnquist Court refracted through one of its grand themes. Making sense of the Rehnquist Court is an ongoing process, and only time will tell if the search for a satisfying understanding of the Court is achievable or quixotic. This Article's firmest prediction is that historians struggling for such an understanding will be forced to grapple with a guttural hostility to the institution of Litigation that leaves footprints across the full expanse of the Court's docket.

461. For biographies of the current Justices listing, *inter alia*, their prior work experiences, see Legal Information Institute, Supreme Court Collection: Current Supreme Court Justices, <http://www.law.cornell.edu/supct/justices/fullcourt.html>.